LAW AND THE LAWS

BEING

The Marginal Comments of a Theologian

BY

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TABLE OF CONTENTS

PREFACE

This essay is based upon lectures given in the University of Oxford in 1949 under the terms of the Wilde Lectureship in Natural and Comparative Religion. My theme was relevant to the three disciplines of Theology, Moral Philosophy and Jurisprudence but was the proper subject of none of them, being their mutual relations.

The face of the world today is inevitably disquieting to the theologian and the moral philosopher, but not less to the lawyer if he has been trained in our traditional reverence for the law. It does not appear how any stable civilization can be built either upon the various new moralities which are commended to us or upon the moral relativism, so prevalent today, which recognizes no final and ultimate standards; for a community without moral standards is inevitably a lawless or law-despising society. In the despair with its attendant Nihilism, which has so largely overwhelmed Europe and is the deepest malaise of our time, the need for prophets of the Law is not less urgent than the need for moral and spiritual prophets. Up to a point at least, it would appear that theologians, moralists and lawyers are faced by a common human need and human task, the restoration of the conditions upon which alone man can live worthily as a human being upon this planet.

But here, I think, lawyers may be disposed to protest that prophecy and evangelism and even responsibility for social and political conditions are outside their sphere of duty. Their concern, they may say, is with the law as it is, not with the law as it ought to be; they must leave the inculcation of moral principles to philosophers or preachers. It may be urged, however, that lawyers are also citizens, and that as heirs and guardians of one of the greatest traditions of Western civilization they have peculiar responsibilities

in the body politic beyond the routine practice of the courts. Law can be studied theoretically without reference to ideal justice or to any spiritual valuation of human life. For scientific purposes such an isolation of law is legitimate and may be sometimes necessary. But where in practice law is divorced from its due connection with justice, and when its system rests upon no presuppositions of spiritual values, the result is tyranny and with tyranny the end of " the reign of law ". If not as theoretical jurisconsults, yet at least as trustees of a very great tradition, lawyers, " else sinning greatly ", as Wordsworth might say, must accept a special responsibility at the present turning-point of human history.

Totalitarianisms with their deportations, their labour-camps and their mass-murders reveal the barbarity into which modern man, for all his scientific attainments, can so easily fall. They reveal man's inhumanity. We seek to find or rebuild a civilization that shall be humane, an expression of man's true humanity. One fundamental aspect of any civilization is law; another is religion, and the two must be fruitfully related. It needs no argument that the law of a people at any time is an expression of its culture, but the right relation of religion to culture is a very delicate matter. It has recently been treated at length and with great insight by Mr. Christopher Dawson in his Gifford Lectures, " Religion and Culture ". On the one hand there is a constant tendency for religious people to suppose that religion deals only with ideal values, that it is contaminated and secularized if it is brought into relation with the workaday world of compromise and un-ideal organization. But if to be religious implies that we must not dirty our hands by touching politics or the life of the law courts, those who feel called to serve their country and their generation will be excluded from the life of religion or, at least, unable to relate their endeavours to religion. On the other hand, as Mr. Dawson says, " the marriage of religion and culture is equally fatal to either partner "; for if religion be tied to the

existing order of society, it loses its spiritual character, while culture, if it be shackled by traditional religion, becomes " as rigid and lifeless as a mummy ". It is as disastrous to identify the justice of the courts with the ideals of religion as to suppose that there is no relation between them. But what theologian or what lawyer in this country has of recent years attempted seriously to relate theological and legal theory? This question is my excuse for making this tentative and temerarious venture.

My incapacities for the undertaking must be admitted unreservedly. I lay claim to no specialized knowledge. In particular, I am not learned in the law. I have made it my endeavour, so far as I could, to become acquainted with what the lawyers are saying and have kept close to the authorities; but even so I may well have made mistakes, for it is easy subtly to misunderstand a proposition through ignorance of its background and full context. Moreover, my theme requires that I discuss the theories of the great teachers of jurisprudence in recent years. Here my knowledge, as I freely admit, is mere textbook knowledge, and such I have learnt deeply to distrust. How often in the field of theology have I found that I had seriously misjudged a scholar by taking his opinions at first from some summary or textbook! For even if what the textbook said is accurate, yet a genial and magnanimous teacher can never adequately be summarized. But it was quite impossible for me to become learned in jurisprudence for the purpose of these lectures, and, after all, what the textbooks say is evidence of the special ideas with which great names are associated in the teaching of the schools, and it is with these ideas, not with their sponsors, that I am here concerned.

If I were to claim that my essay is directed towards a Christian philosophy of jurisprudence, I should expect many Christians and most lawyers to be up in arms, the Christians declaring that the Church's sphere is grace, not law, and the lawyers that jurisprudence is an autonomous science and no

branch of theology. I should be in much agreement with both parties. None the less, if we are to build a free and stable and just civilization, an ambition I may be allowed to ascribe to the lawyers, and if we are to claim the life of the world for Christ, the acknowledged duty of the Christians, it is very necessary that there be some understanding or concordat or circumincession between the representatives of religion and of jurisprudence.

In the preparation of these pages for the press I owe and feel much gratitude to Mr. J. B. Butterworth, Fellow of New College, Oxford, for his careful and kindly consideration of my typescript and for his many and most serviceable admonitions, also to Professor A. H. Campbell, of Edinburgh, for his comments and advice.

If a dedication be deemed in order, I should offer this essay to my Father who took silk in the reign of Queen Victoria, was Treasurer of Lincoln's Inn twenty years ago, and on whose eight and ninetieth birthday I had my manuscript finally ready for the publisher.

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CHAPTER I

Jurisprudence and Ethics

There was a time when there would have been no need to argue that there is ground common to Theology, Moral Philosophy and Jurisprudence, for Theology was the recognized Queen of the Sciences from whom the various subsidiary and subject disciplines derived many of their assumptions and first principles. Today each science or discipline is apt to claim its own complete autonomy, and the different faculties of a university live and work largely in regrettable isolation from each other. Lawyers today would smile at the suggestion that their subject is a branch of moral philosophy, or that it falls in any degree within the scope of the theologian. Moral philosophers, on the other hand, admitting that cases in the courts raise many interesting ethical questions, would not claim that the study of law falls within their sphere, and, if they were willing to consider what they would call " Christian ethics " as worthy of their notice, would emphatically repudiate the idea that theology has a relevant word to say to them as technical philosophers. Till recent years theology itself would seem to have consented to its isolation; its field was taken to be esoteric religious experience or the sphere of value-judgments, a region beyond the reach of secular philosophical reflection and unviolated by the worldly judgments and the compromises of the law courts.

I

First, then, a case can be made for the view that ultimately and in principle jurisprudence has nothing to do with ethics. It would be admitted that in primitive societies embryonic law, religion and ethics are inseparably conjoined. If the eating of pig, for instance, is tabu, this may be regarded as a matter of customary law; it will also be an aspect of the tribal religion; further, since the tribesman will know that he *ought not* to eat pork, the prohibition will be to him a matter of conscience and of ethics. All ancient codes of law are religious, at least in the

sense that they are supposed to have divine authority, and all are related to moral obligation. Indeed, the intimate connection between law, morality and religion was recognized amongst ourselves till yesterday. Mr. O'Sullivan may go too far in claiming that in England till the time of Lord Mansfield the law was regarded as a branch of ethics,[1] but till comparatively recent days, as Dr. Allen says,[1a] " the absolutely unlimited sovereignty of statute has not been admitted in the theory of our law ", and he quotes M. Lambert as saying, " it is only by the protracted influence of arbitral or judicial decisions . . . that law becomes differentiated from ethics and morals ".[2] Thinkers so recent as Bentham and Ihering have tended to deny any basic distinction between law and morals.[3] Christian ethical teaching on the relation of the sexes provides the norm by which the Common Law decides what contracts are too immoral for the enforcement of the courts,[4] and incest as contrary to " the law of God " was not made a misdemeanour till 1908,[5] though this was primarily a question of the relation of civil to ecclesiastical law.

But law, it may be maintained, has been gradually winning its place as a science unrelated alike to ethics and to theology; the end of the process is in sight. It is claimed that Roman law really begins as a great system when the priestly tradition was displaced by a lawyers' tradition; so in England from the thirteenth century onwards the Common Law progressively developed as clerical judges were displaced by secular lawyers; so too in the United States of the eighteenth century the rise of systematic American law coincided with the rise of the legal profession.

Oliver Wendel Holmes in an often quoted aphorism suggests that in any particular case the answer to the question " what is the law? " is a somewhat hazardous prophecy of what may be decided by the court. Yet this is not as arbitrary as it sounds, for the court will be guided by principles some of which may turn out on inspection to be ethical or even religious. But Holmes in his lectures on the Common Law marks the tendency

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1 *Christian Philosophy and the Common Law*, p. 28.
1a *Law in the Making*, 1st ed., p. 253.
2 *Ib.*, p. 79.
3 *v.* J. Stone, *The Province and Function of Law*, p. 303.
4 C. S. Kenny, *Outlines of Criminal Law*, 15th ed., p. 165.
5 Punishment of Incest Act, 8 Edw. VII. c. 45.

of law to move, as it were with deliberation, from the ethical to the legal conception of justice. He admits, for instance, that the law of liability in respect of both criminal law and of torts starts from a moral basis, but these moral standards, he says, are constantly being transmuted into external or objective standards, to which ideas of moral guilt have no relevance.[6] The law may use ethical terms, such as " deceit " and " fraud ", but it uses them in a legal and non-ethical sense. Ethics is concerned with motive, moral guilt or innocence; the law, especially the law of contract, is concerned with overt act and not with conscience. It would not be true that the law never considers motive; it distinguishes, for instance, between homicide and murder, but it is never concerned with sin (which is a theological term), and is concerned with intention usually with an eye to the action contemplated, not to the state of the agent's soul. The law, in fact, is not directly concerned with morals which are the subject matter of ethical philosophy.

Another instance of the gradual and, as it might be argued, the right and inevitable secularization of law may be taken from Equity itself. The Chancery Court, originally set up by the Lord Chancellor as " Keeper of the King's conscience ", was in its first form a court of appeal from law, that is, from the law of the king's courts to the king's conscience or to natural justice. Strictly it was not a court of law at all; it was a court of ethics or of conscience or of mercy as opposed to law. Today, while Equity and Common Law remain formally distinct, they are administered by the same persons in the same courts; Equity has become a legal term.

That there is a clear distinction between law and ethics needs no long argument. The law serves the purpose of protecting society; it is concerned with " harms " done to citizens, not with morals; it has an eye to social dangers rather than to ideal principles; it may plead necessity more convincingly than justice or any moral principle in many of its provisions. Till a few years ago " the successor to the property of a dead man who had committed a civil wrong against another—say, crippled him for life by the careless driving of a motor-car—succeeded to that property free from all liability to compensate the victim if the wrong-doer happened to die before a judgment was given

[6] *The Common Law*, pp. 37 f.

against him at the suit of the victim; the old maxim that a personal action died with the person—*actio personalis moritur cum persona*—maintained its ground in spite of universal acceptance that morally the proposition was indefensible ".[7] An action may be the occasion of a criminal prosecution, or a man may be guilty of " malice " before the law, though he may have harboured no evil intent whatever. " Malice " is, indeed, one of those ethical words which in law has largely lost, or may be said to be in process of losing, its ethical significance. In criminal law, as Pollock observes in this connection,[8] the disregard of the ordinary meaning of words has been " extreme ". There are, indeed, cases where actual malice in the ordinary sense of the term is a matter of concern to the courts but only as one of the facts to be considered. A malicious deed as such is not actionable; the law, in fact, allows, or takes no cognisance of, certain malicious acts. " The theory of torts ", wrote Holmes,[9] " may be summed up very simply. At the two extremes of the law are rules determined by policy without reference to any kind of morality. Certain harms a man may inflict even wickedly; for certain others he must answer, although his conduct has been prudent and beneficial to the community." The first law of ethics, as Kant would say, is to treat every man as an end in himself, never as a means to some other end; but the law, at least the criminal law, acts otherwise, for the penalties it inflicts are often no expression of ideal justice but a means to another end, namely, the better conduct of other people. Holmes frankly admits that on occasion public policy, as reflected in the law, sacrifices the individual to the general good.[10]

Law and ethics, then, are clearly distinct. Ethics is concerned with the *summum bonum*, an abstract, theoretical question; the law is concerned with an approximate good, the greatest good that is feasible under existing circumstances. Ethics is concerned with what in principle is right; the law must be limited to what under the given circumstances is convenient. The law is concerned with men as members of society; ethics looks upon the heart. With law conduct, and with ethics

[7] Sir John Fischer Williams, *Aspects of Modern International Law*, pp 14 f.
[8] *On Torts*, 14th ed., p. 230.
[9] *The Common Law*, p. 161.
[10] *Op. cit.*, p. 48.

motive, is of primary concern. Love is the ultimate demand of ethics, but, as Dr. Paton puts its, " the solicitor comes in through the door, as love flies out of the window ".[11]

II

But common speech, representing our traditional and assumed principles, indicates an ineradicable sense that there is some connection between law and justice, which is an ethical term. " I'll have the law on ye " means " I will go to the courts for justice "; *jus* and *justitia* are inseparably conjoined. The story is told that among those who welcomed William of Orange to London was the senior member of the bench, an old judge of ninety-one. William, it appears, congratulated the old man upon his surviving all his compeers. To this the judge replied, " And, if your Highness had not come over, I should have outlived the Law itself ".

The ineradicable connection between law and ethics is indicated by the language of modern nations. *Droit* in French, *Recht* in German, *diritto* in Italian, *derecho* in Spanish are words all of which may be translated " law ", yet each of them carries the connotation of a system of ideal justice. *Ex turpi causa non oritur actio*, we say. According to French law all agreements contrary to *bonnes mœurs* are void, and the German law which invalidates all transactions in conflict with *gute Sitten* was drawn up when *Sitten* connoted morality as understood in Christendom.[12] But this conception is older than Christendom. It was not even invented by Homer or by Plato. It is strikingly illustrated by an inscription found upon Hadrian's wall at Borovicium, the modern Housesteads, in 1883.[13] The inscription runs : *Deo Marti Thingso et duabus Alaesiagis Bede et Fimmilene et n(umini) Aug(usti) Germ(ani) cives Tuihanti V.S.L.M.*[14] Tuihanti is probably the modern Twenthe on the east of the Zuyder Zee. The altar on which the inscription stands is to be dated from the time of the emperor Alexander Severus (A.D. 222–235). Here the god, Mars Thingsus, is closely associated with two female deities,

[11] *Jurisprudence*, p. 58.
[12] *v.* Gutteridge, *Comparative Law*, 1944, pp. 95–98.
[13] *v.* L. von Schroeder, *Arische Religion*, vol. i, pp. 492 ff.
[14] To the God Mars Thingsus and the two Alaesiages Beda and Fimmilena and to the deity of Augustus German citizens of Tuihanti have willingly and duly paid their vow.

and all three are clearly in intimate connection with the political and, as we should say, the legal life of this heathen north-European tribe; for the names Beda and Fimmilena are plainly connected with the two chief "Things" of the tribe, the *Bodthing* and the *Fimmelthing*. The first meaning of the word "Thing", as given in the *Oxford English Dictionary*, is "a meeting, assembly *esp.* a deliberative or judicial assembly, a court, a council". A little later the word comes to signify "a matter brought before a court; a legal process; a charge brought, a suit or cause pleaded before a court". Over the Thing presides Mars of the Thing with his two consorts. Mars is here plainly an accommodation to Roman nomenclature; he represents Tiu, who is sky-god and god of war and also god of the Thing who presides over the deliberations and decisions of the tribe; he corresponds with *Zeus Boulaios* and *Zeus Agoraios* of the Greeks; like Jupiter and Varuna he is a god of justice and of righteousness; he is, in fact, the great ethical sky-god of the Aryan tradition which goes back to the neolithic age. There is long standing for the claim that jurisprudence and theology are intimately connected!

The lawyer's business admittedly is to expound and administer the law, not to discuss ethical principles; but many of the main concepts of jurisprudence have not merely an ethical flavour but also an ethical basis and an ethical connotation. Equity is an obvious instance, but "ownership" also is fundamentally an ethical question. "The form of ownership", wrote Professor R. M. MacIver,[15] "is the foundation of every social order and the supreme institutional test of its ethical quality. Every system of ethics, and beyond that every religion, must, in so far as it exercises a living influence in the world, take a clear stand on this crucial question." Liability, again, as treated in law, is concerned with wrongful intent, with negligence, both ethical questions, and with a moral obligation which may arise in a case of ignorance or other circumstances of innocence. "Principles of liability in the last analysis", writes Dr. Allen, "must be derived from the moral sense of the community."[16] It has been urged that the law of Contract is a matter of convenience, not of ethics, on the ground that the law regards not the intentions of the

[15] *The Right of Ownership* in *Outlines of Christianity*, vol. v, p. 111.
[16] *Legal Duties*, p. 111.

parties but what they have said and done as interpreted by a disinterested party. This is not wholly true, for intention is considered by the law when fraud or undue influence is alleged. Moreover, it is an ethical principle that a man should be held to his statements and responsible for his negligence. Further, the law of Contract rests upon the ethical principle, *pacta sunt servanda*, compacts must be kept; and even that principle is not absolute in English law which will refuse to enforce contracts for immoral purposes. Finally, the law of Torts deals with various species of liability for harms which a man may commit against his neighbour. What are these harms but injustices? And what is man that he should be liable in law and ethics to make amends to his neighbour for certain actions? Not without reason does Dr. Allen speak of "this essentially and immutably ethical aim of law".[17]

[17] *Law in the Making*, 2nd ed., p. 359.

CHAPTER II

Jurisprudence and Theology

Moral philosophy deals with justice as an ideal, whereas jurisprudence keeps rigorously to the expedient and the possible, but as least there is common ground between them. But is there common ground between these and theology? It may be argued that modern treatises on ethics, such, for instance, as Mr. Carritt's recent book on *Ethical and Political Thinking*, are wholly remote from theology, that odd legal notions such as *deodand* are mere vestiges of earlier and less philosophical jurisprudence, and that there are Christian theologians who regard "Christian ethics" (a term of which they do not approve) as based upon entirely different principles from those treated in the schools, and who would confine the sphere of theology to the doctrine of God, the future life and religious "experiences" that have nothing to do with ethics, politics or jurisprudence.

But, at least as a matter of history, theology and jurisprudence have exercised a mutual influence. Roscoe Pound, for instance, indicates the influence of the Protestant jurist-theologians on public law by their insistence on individual responsibility and on the authority of the individual conscience; they were also, he says, the Fathers of the Bills of Rights in the American constitution, while American law shows the marks of the Puritan conceptions of a "willing covenant of conscious faith", of "consociation but not subordination", and of the individualist conceptions that arise from these ideas. Conversely, there has been manifest influence of jurisprudence upon theology. For instance, St. Anselm's doctrine of the Atonement might be regarded as a transcript of the feudal system of his day into theological terms, and the Roman penitential system would seem to many to owe more to Roman law than to the Gospel.

But a mutual relation of this kind does not necessarily involve a common ground, and the interests of religion and of jurisprudence might seem not merely different but divergent also.

For instance, jurisprudence is concerned with justice, religion with love or charity. How are justice and love to be related?

I

It has been argued that love is a personal relation between persons, whereas justice is always relative to things that belong to persons. "The idea of justice", writes Dr. Brunner, "belongs not to the sphere of personal ethics, but to the ethics of systems or institutions. . . . While justice always appears as an inferior value in the ethics of the person, in the ethics of institutions it is the supreme and ultimate standard. The highest requirement of systems, institutions, laws, is that they should be just, while it is required of man that he should meet his fellow-man not in justice but in love."[1] Then are we not as Christians to treat men justly, and is law in permanent contrast or opposition to the Christian attitude? Dr. Brunner holds that when Jesus Christ said, "who made me a divider over you?" (Luke xii, 14) or "render unto Cæsar the things that are Cæsar's, and unto God the things that are God's" (Mk. xii, 17), he was bidding men not to confuse the Kingdom of God with the problems of earthly justice: his Kingdom was not of this world (Jno. xviii, 36); when he told the parable of the labourers each of whom received the same wage at the end of the day (Mt. xx, 1 ff.), he was not laying down rules for the payment of wages to labourers; he was declaring love, not justice, or *justitia evangelica* as distinguished from *justitia civilis*.[2]

This is a useful suggestion, but it does not solve all difficulties. Justice is to give every man his due—*suum cuique tribuere*. But what is man's due? "Owe no man anything but to love," said the Apostle Paul (Rom. xiii, 8). Can we never do any man justice unless we love him? Certainly love as a personal relation does not in any degree cover the field of duty, for many of our duties are related to persons with whom we cannot have personal relations at all. We may love the postman, if we get to know him, but we cannot love the miners who hew our coal—if love involve a personal relation. We need,

[1] *Justice and the Social Order*, E.T., p. 25.
[2] *Ib.*, pp. 103 f.

said Archbishop William Temple,[3] "a clearer and deeper understanding of the difference between justice, human love and Christian charity. The last transcends both justice and human fellowship, while it has contacts with each. Associations cannot love one another; a trade union cannot love an employers' federation, nor can one national state love another. The members of one may love the members of the other so far as opportunities of intercourse allow. That will help in negotiations; but it will not solve the problem of the relations between the two groups. Consequently, the relevance of Christianity in these spheres is quite different from what many Christians suppose it to be. Christian charity manifests itself in the temporal order as a supra-natural discernment of, and adhesion to, *justice* in relation to the equilibrium of power". In the case of those with whom we cannot enter into personal relations the first means by which love can express itself is through political action in the interests of justice on their behalf. Law, therefore, which aims only at justice, may be the true and proper expression of love. Justice will be the expression of love in impersonal relations.

II

In personal relations, on the other hand, the Christian ethic and the law of the land are bound to differ. The Christian ethic demands that a man should love his neighbour as himself. In answer to the question, "Who, then, is my neighbour?" our Lord told the parable of the Good Samaritan, from which we infer that any man in need of our help is our neighbour whom we are bound to serve to the best of our ability. What is the legal parallel to the story of the Good Samaritan? In a well-known judgment given by Lord Atkin in the House of Lords in the case of *Donoghue* v. *Stevenson*,[4] "The rule that you are to love your neighbour," he said, "becomes in law, you must not injure your neighbour, and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be:

[3] *Christian News-Letter*, December 29, 1943, supplement 198, pp. 10 f.
[4] [1932] A.C. 562.

persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question ".

The answer of the law may seem jejune when set beside the generosity of the evangelical command, nor does the law take cognizance of all the acts and omissions whereby our neighbours may be harmed. But if we compare the presuppositions of this requirement of the law as interpreted by Lord Atkin with the presuppositions, for instance, of traditional Hindu society, we may recognize what is meant by a Christian nation or a Christian civilization. The law may be a real, though imperfect, expression of Christianity. " For the great majority of people," writes Dr. T. S. Eliot,[5] " religion must be primarily a matter of behaviour and habit, must be integrated with its social life, with its business and its pleasures; and the specifically religious emotions must be a kind of extension and sanctification of the domestic and social emotions." The law must not be identified with religion, but be an expression of the people's religion, or, to cite the same writer (substituting " the legal system " where he writes " education "), " in a Christian society *the legal system* must be religious, not in the sense that it will be administered by ecclesiastics, still less in the sense that it will . . . attempt to instruct everyone in theology, but in the sense that its aims will be directed by a Christian philosophy of life ". Dr. John Baillie identifies himself with Dr. Eliot's contention that a Christian society consists of " men whose Christianity is communal ", as he puts it, " before being individual ", for this " has been the order of things throughout the whole of our western history ".[6] A Christian nation is not a nation wherein every member is a convinced, soundly converted and devoted adherent of the Church, but a nation wherein the habits, the customs, the sentiments, the laws represent a Christian outlook.

The justice of jurisprudence can only be an approximation to ideal justice limited by that which in a given state of society or civilization may be possible. Religion is concerned with the ideal, yet not with the ideal as an abstraction (the field of philosophy) but with the ideal as related to the actual world

[5] *The Idea of a Christian Society*, 1939, p. 30.
[6] *What is Christian Civilization?* 1947, p. 43.

and the actual situation of mankind. It would seem that this may be illustrated from the teaching of Jesus Christ. Moses, he said, "for the hardness of your hearts" permitted, under certain circumstances, a bill of divorce, but "from the beginning it hath not been so" (Mt. xix, 8). Monogamy and lifelong fidelity have always, "from the beginning", been the real meaning of marriage, the purpose of God in making human beings male and female. Monogamy is that which Nature and the Author of Nature intend by marriage, and it is possible in a Christian sect or hand-picked society to insist upon this law with rigour. But human society as a whole is not yet able to bear it. Therefore Moses, for the hardness of men's hearts, had to permit divorce under certain circumstances. The law must approximate, so far as it can, to the ideal, but it is limited by the possible, and as such the law of Moses is, as it were, taken up into theology and regarded as the law of God. "The adaptation of the Mosaic law to the 'hardness of your hearts'", writes Dr. Brunner,[7] "was not the product of a moment of weakness and false forbearance, but an inward necessity. Absolute justice would not be just, but unjust, as a system of state law within given reality."

This illustration points towards the place of jurisprudence within the field of a Christian philosophy. It is the immanent law of nature, which is the law of God, that husbands and wives shall love one another and remain loyal to one another so long as they both shall live. But neither love nor fidelity can be compelled. Men and women, being weak and foolish creatures, break the intention of God and Nature, they quarrel, they are unfaithful to one another; under certain conditions Moses, declaring the will of God, may grant a bill of divorce. But under what conditions? Such a question takes us into another field, but we may here venture the proximate answer that those laws will be just and right which with a view to the general good of society approximate as nearly as possible to the ideal, that is, so far as circumstances permit; or, as Dr. Brunner puts it,[8] "the modification of the status of man due to evil necessitates a modification of the order of justice, not only in the sense that it becomes a coercive system of positive law, but also in the

[7] *Op. cit.*, pp. 94 f.
[8] *Ib.*, p. 93.

sense that the substance of this positive law cannot coincide with that of the law of nature laid down in the order of creation. That is why," he continues, " there *must* be a difference, if not an antithesis, between positive law and the law of nature ".

III

There is this further intimate and essential connection between theology and jurisprudence that, apart from a spiritual estimation of man, law, as we have known it in Christendom, must cease to be. Every system of law rests upon some anthropology or doctrine of man, implicit or explicit. It is true that law may be studied without any such reference, and the so-called Realist school treats law simply as a collection of facts, such as statutes, judicial decisions and customs; it does not look for any *rationale* or philosophical explanation of those facts. But Law is a living, growing thing, like a nation or a constitution, and therefore to study law with an eye to facts only and to the exclusion of purposes seems like studying instinct in animals or insects without asking what purpose the instinct serves. It is difficult to see why the term " Realist " should be applied to an approach so partial and unphilosophical. All law that is not arbitrary serves some rational purpose, and arbitrary law, if the phrase be taken seriously, is almost *contradictio in adjecto*.

In the laboratory, but never in life, can law be sundered from sociology, politics, public opinion and, therefore, from current ethical and theological ideas. For instance, both the theory and content of law in any age are profoundly influenced by the fact that society as a whole accepts or repudiates the idea of the living God of justice and of mercy. Thus Professor Gilbert Murray in discussing Hellenism points to the difference between Greek potentates and the arbitrary monarchs of the East. " Greek potentates ", he writes, " are always sharply warned that they are not gods and will only get into trouble if they think they are. . . . The law is always above them. They must not put people to death without trial; nor seize other men's wives and daughters; nor amuse themselves or the dregs of the people with gladiatorial games. Before they accepted such things as that, as the philosopher Demonax put it, they must ' overthrow the Altar of Pity in the market-place '."

Jurisprudence as such does not define justice. " The guiding principle of a judge in deciding cases ", said Lord Wright,[9] " is to do justice. . . . What is just in any particular case is what appears to be just to the just man, in the same way as what is reasonable is what appears to be reasonable to the reasonable man." No doubt there is a vast difference between ideal justice and any fallible man's notion of what is just, but it is only because we have a sense of absolute justice that we can call law an approximation to justice. " It is precisely *because* we can conceive of an absolutely straight line that we can say that no man has ever drawn a straight line ", writes Dr. Brunner [10]; " it is just because we have knowledge of the law of absolute justice that we can say that all human laws are mere approximations to the truly just." Dr. Allen writes,[11] " the ' natural sense of justice ' . . . is not a meaningless term. All law must postulate some kind of common denominator of just instinct in the community. There is no meaning in any legal system unless this foundation exist. Infinite though the variations of subjective opinion may be, it needs no subtle dialectic to demonstrate that there is in man at least an elementary perception of justice, as a form of the right and the good, which no law dare flagrantly transgress ". Positive law, said Pollock,[12] " assumes the existence of society and morality ".

The Marxists claim that the idea of justice in any age is a conventional representation and reflection of the balance of economic power at the time; they deny any eternal or transcendental Justice. No doubt much law that today we regard as grossly unjust was once accepted as just because it accorded with the current ideas of the time. None the less the moral power of Marx and of the movement or movements springing from his loins lies in his fundamental appeal for justice on behalf of the dispossessed. He appealed, in fact, from conventional and accepted ideas of justice to conscience, to absolute justice, to that sense of justice implanted in the breast of every man as a rational creature though often overgrown by convention and choked by self-interest. " Whoever says with serious intent, ' That is just ' or ' That is unjust ' ", writes Dr.

[9] Quoted Paton, *op. cit.*, p. 78, n. 3.
[10] *Op. cit.*, pp. 27 f.
[11] *Law in the Making*, p. 210.
[12] *Essays in Jurisprudence and Ethics*, 1882, p. 23.

Brunner,[13] " has, even though unwittingly, appealed to a superhuman, supreme or ultimate tribunal, to a standard which transcends all human laws, customs and usages, a standard by which all these human standards are measured ", and, again, " there is a close kinship between truth and justice. Man can invent neither, he can only seek them ". Similarly Vinogradoff [14] called attention to the very significant German legal phrase, " *das Recht finden* ". Justice is not that which man ordains; it is that which he seeks to discover.

If then at bottom, even if but implicitly, Marxism rests upon a claim of justice, how comes it that the Communist conception of law differs so fundamentally from that of Western tradition as to seem the negation of all law? Undoubtedly because the Marxists have repudiated the conception of man as a spiritual being. Law-givers must necessarily consider the nature of man for whose society they must legislate; is he a being capable of self-direction, is he worthy of freedom, is he a spiritual being, is he a creature of mortality alone, or has he an immortal spirit, an eternal destiny? An implicit answer to these religious or theological questions underlies all political planning and actual jurisprudence. To the Soviet lawyer, writes *The Times* Special Correspondent (Dec. 11, 1947) " law, expressing, as he believes, the will of the ruling class, exists for the purpose of ' preserving, strengthening, and developing such social relations and usages as are profitable and favourable to the ruling class ' (Vyshinsky). In conformity with this view the Soviet Civil Code refuses protection to any rights which are ' exercised in conflict with their social and economic purpose '. So far from being an impartial arbiter in the conflict between classes, individuals, and the general interest, Soviet law exists to protect the interests of the proletariat in its struggle against its enemies, in accordance with the fundamental faith of the Russian system of life, that the individual is ultimately better served by perfecting the whole community of which he is only a transient part ". This last sentence is curiously phrased. It is hard to see how the individual is either immediately or ultimately better served by being totally neglected in the interests of other people, but the infelicity of phrase points to

[13] *Justice and the Social Order*, p. 47.
[14] *Common Sense in Law*, p. 119.

the fact that in Russia the law, so far from being for the protection of the citizen, is a mere instrument for the carrying out of government policy, and this because the individual is of no intrinsic significance except as a member of a class. Law has become an instrument of tyranny because all spiritual doctrines of human personality have been jettisoned. Just this occurred also in Nazi Germany. The rejection of religion heralds the end of the reign of law.

What system of law will follow from the Christian valuation of man? According to the theologians man is "made in the image of God" but is a "fallen" creature. As "made in the image of God" man is, at least in some degree, a rational being responsible for his actions; as "fallen" he is only in some degree swayed by reason and finds it difficult or impossible to fulfil all his duties. In principle and fundamentally he is a spiritual being belonging to the temporal world of sense but having an affinity with the transcendent and eternal; he is intended by his nature to be a rational, moral, spiritual being, a child of God; but with that nature something has gone radically wrong, and, as Archbishop William Temple put it, "the corruption is at the centre of rational and purposive life". Law as an expression of justice proper to man's nature must provide for and defend man's freedom because he is a spiritual being; it must also coerce, because he is a "fallen" creature prone to evil.

IV

What doctrine of man underlies the law administered in British courts? Jurisprudence since the Middle Ages has claimed and won its independence as a science from theology. Has our law as a matter of fact been secularized in the sense that it now presupposes a secular, non-religious, materialistic conception of human nature?

A lawyer might say that, so far as the law is concerned, man is simply a substance in which rights and duties inhere. That is a very abstract way of putting the case. About any particular legal system we may properly ask what rights and what duties inhere in this odd substance, and this leads back to the question of the nature of man as contemplated in that system.

In a speech reported in *The Times* (May 13, 1946), Sir Hartley Shawcross said : " Parliament is sovereign ; it can make any laws. It could ordain that all blue-eyed babies should be destroyed at birth ; but it has been recognized that it is no good passing laws, unless you can be reasonably sure that, in the eventualities which they contemplate, those laws will be supported and can be enforced ". There does not seem any difference in principle between this and Goering's assertion that " the law and the will of the Führer are one ",[15] and Mr. O'Sullivan properly comments that " Jurisprudence is no longer a part of ethics ; it is a nice calculation of force ".[16] None the less Sir Hartley Shawcross may have been expounding accepted constitutional law. " The principle of Parliamentary sovereignty ", says Dicey,[17] " means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever ; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament." Dicey cites in his support the evidence of Blackstone, who himself quotes Sir Edward Coke.[18] But these authorities should be understood to be asserting, not that ethical considerations have no place in jurisprudence, but that statute law is good law. Coke is reported to have said in *Bonham's Case* (1610), " and it appears in our books, that in many cases the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void ; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it and adjudge such Act to be void ", upon which Dr. Allen comments [19] " there is not, so far as I am aware, a single example in our books of the courts rejecting the plain and express provisions of a statute on the ground that it was contrary to any ethical principle ".

In practice, we should consider the nature and occasion of the protection offered to the individual man by the law and the ideas of public policy which, if they be not themselves principles

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[15] *New York Times*, July 13, 1934. *v. Hitler's Speeches*, N. H. Baynes, vol. i, p. 518.
[16] *Christian Philosophy in the Common Law*, p. 55.
[17] *The Law of the Constitution*, 3rd ed., p. 38.
[18] *Ib.*, pp. 39 f.
[19] *Law in the Making*, 1st ed., p. 256.

of law, are in fact principles by which law-makers, whether in Parliament or on the Bench, are inevitably and rightly guided.

Thus the writ of *habeas corpus* has a theological implication. We are apt to consider it in terms of the rights of an individual, but a right presupposes a value. The individual is to be treated with respect, even with a kind of reverence. The law does not explicitly assert that man is a child of God; but where systems of law have arisen, as in Germany and Russia, which implicitly deny that he is a child of God, there is no writ of *habeas corpus*, and those who are displeasing to the authorities simply disappear leaving no trace. It is a question how long the writ of *habeas corpus* would be available in this country if secularism and moral relativism were to become predominant in the national life.

Many other illustrations lie to hand for the lawyers. Under English law cruelty even to an animal may under certain circumstances be indictable as a felony.[20] A certain respect or reverence is due to all sentient creatures and *a fortiori* to all human beings. Thus the law will defend so spiritual and intangible a treasure as a man's reputation. Of this an interesting instance is cited by Stone [21] : in *Melvin* v. *Reid* in 1931 in the American courts a prostitute, who in earlier years had been acquitted in a murder trial, was successful in an action against a company that wished to fill the cinemas with a picture of her former life entitled " The Red Kimono ". A lawyer might here object that the law is not concerned with a person's reputation but only with damage done to the detriment of his prosperity. But we may cite Pollock's view,[22] that " the law went wrong from the beginning in making the damage and not the insult the cause of action "; he contrasts this with the sounder principle established in regard to assault. In any event we observe that the damage taken into account is done to the individual, not to society; the law, therefore, presupposes the intrinsic value of the individual person.

Not all who approve such laws hold a spiritual view of the universe, but a spiritual view of personality is logically implied in such laws, nor could it be thought that such laws are promulgated or even envisaged where an unspiritual view of man and

[20] *v.* Kenny, *Outlines of Criminal Law*, 15th ed., p. 195.
[21] *The Province and Function of Law*, p. 515, n. 42.
[22] *On Torts*, 14th ed., p. 193.

nature is consciously adopted. The defects in the law are many, but the conception of man which underlies the judicial systems of the West is congruous in general with the Christian valuation of man and is inconsistent with Marxist or Nazi valuations, and it must be surmised that an overt abandonment of the Christian faith in this country would very quickly lead to profound changes in legal principle.

The conception of " Public Policy " occurs primarily in connection with the law of contract but is of wider scope. " The very considerations which judges most rarely mention, and always with an apology ", wrote O. W. Holmes,[23] " are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned ". Thus Winfield [24] defines public policy as " a principle of judicial legislation or interpretation founded on the current needs of the community ". Such a principle may be perverted to the overthrow of law in the " Peoples' Courts " of totalitarian States, and " the sound feeling of the German people " may be another name for the whim of the Party leader. But in this country " the current needs of the community " is a phrase to be understood of spiritual or moral needs as well as political or economic. Lord Mansfield is reported to have said that " the law of England prohibits everything that is *contra bonos mores* ". If strictly interpreted this would not stand today if ever it has stood. It was decided in the House of Lords in 1917 that the maintenance of the Christian religion is not part of the policy of English law.[25] None the less public policy protects certain " religious, moral and humanitarian interests ".[26] The defence of the family, the protection of children and wards, the protection of morality in general are fundamentally matters of public policy, and no agreements contrary to good morals can be recognized by the courts as valid. It is for the Christian to consider whether the support and vindication of these principles is not a considerable part of his duty as a Christian, and it is for the lawyer as such to consider whether the spiritual attainments of the law could be maintained, if the spiritual faith of the nation should be lost.

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[23] *The Common Law*, p. 35.
[24] In the *Harvard Law Review*, cited Paton, *op. cit.*, p. 103.
[25] In *Bowman* v. *Secular Society*, [1917] A.C. 406.
[26] Paton, *op. cit.*, p. 466.

In simplest terms, the principles of public policy in this country are closely related to the Christian faith.[27]

Reasonableness no less than justice is required of men in their mutual relations. Is the " reasonable man " a Christian? Reasonable conduct has been defined, or at least expounded, in a divisional court of the King's Bench as " fair and proper and such as reasonable, honest, fair-minded men would adopt ".[28] That will not do as a definition, but it is for our present purposes illuminating. The law presupposes that in general men know what is reasonable and fair and are bound to conduct themselves accordingly. Men often act unreasonably, but they should not, and they need not. We may expect and require them to be reasonable, honest and fair-minded. In fact, we do not expect them to behave like " the economic man " of the text-books; we are far removed from the notion of the ordinary man to be found in Hitler's *Mein Kampf* or presupposed in Marxist legal principles.

The law is concerned with overt act, not with conscience. The law of tort does not as a rule delve into the mind of a defendant, but it sets up the standard of " the reasonable man ". Reasonable conduct is understood not as that which the actor so regards but that which the jury so regards. Perhaps it is because we assume man's duty to be reasonable and responsible that, as Dr. Allen says,[29] there is no statute that expressly defines or forbids assault, libel, false imprisonment and negligence. Even murder, it would appear, is not defined by statute. We may not conclude that the reasonable man, as understood by the law, is a Christian, but plainly he lives in a Christian country.

" And if your Highness had not come over, I should have outlived the Law itself '. There was law of a sort in Nazi Germany; there is law of a sort in Soviet Russia; the whim of a tyrant may in some sense be law. Yet tyranny is at the deepest level the negation of all law as we understand and practice it. The purpose of this chapter has been to indicate the fundamental connection between theology and jurisprudence and to raise the question whether law as we understand it

[27] *v.* also p. 110, *infra.*
[28] *v.* Allen, *Law in the Making*, pp. 97 f.
[29] *Ib.*, p. 34.

can be secure apart from those religious principles from which in history it has been derived. There can be no durable reconstitution of the life of Europe except through a revival of reverence for God and reverence for law; the two reverences are most intimately connected, and lawyers and evangelists may be deemed to share a common task and duty.

CHAPTER III

The Classical Tradition

From the ancients we receive a strictly philosophical conception of law. Jurisprudence was intimately related to their view of the universe as a whole. For them, indeed, law was a philosophical or even a theological term before it was juristic. This may be conveniently illustrated from Cicero's treatise *de Legibus*, for Cicero was not only heir of the Greek tradition but also himself a practising advocate.[1]

Cicero says explicitly that he does not expect everyone to agree with him.[2] Those will not agree with him who do not accept his presupposition that what is right and honourable should be sought for its own sake, and nothing should be deemed good that is not laudable. He points out that even the wicked seek to justify their crimes[3]; men know that they should be just and virtuous; even the worst must for very shame justify themselves by showing that they exhibit honest and virtuous characteristics. Thus it was noticeable that both the National Socialists in Germany and their fellow-criminals in Japan were anxious to show that they, and they alone, stood for freedom, for justice, for the common good. The Russians have in effect defined law as the will, and justice as the good, of the dominant class, but a Russian judge, General Rudenko, at the Nuremberg Trial can still speak of "the principles of law or the most elementary standards of human morality".[4] With what degree of sincerity these words were spoken we are not called to judge; but none will dispute that "all good men love equity itself and right itself; nor is it the part of a good man to be in error or to love that which is not intrinsically lovable; therefore right

[1] Cicero was advocate or *orator*, not a jurisconsult learned in the law. The philosophical principles he adduces are of Greek origin and throw no light upon technical Roman jurisprudence. *v.* F. Schultz, *Roman Legal Science*, pp. 44, 72. Thus in Roman jurisprudence *jus naturale* had nothing to do with the rights of man or a higher transcendent law; it was rather a principle of interpretation. *v.* D'Entrèves, *Natural Law*, pp. 29 f.

[2] *de Legibus*, I, 13, 37.

[3] I, 14, 40.

[4] *Speeches*, H.M. Stationery Office, 1946, p. 146.

(*jus*) is to be sought and fostered for its own sake; but if this is true of right (*jus*), it is also true of equity (*justitia*) ".[5]

Cicero starts from a noble conception of human nature. " The foundation of law ", he says,[6] " is that by nature we have a propensity to love men; all men are bound together by a certain kindliness and goodwill as they are by a partnership in justice (*societate juris*). The original basis of law and justice can only be found when we have first enquired into the meaning and purpose of life, into the questions what it is that unites men, and what natural fellowship there is amongst them.[7] If we look for the nature of justice, we must seek it in the nature of man.[8] Man is distinguished from the brutes as a rational creature.[9] But the reason, in virtue of which he is rational, is at first but embryonic or potential. It needs to be developed, and when it is fully developed it is called *sapientia* or wisdom.[10]

Reason, which is potential or imperfect in man, is fully realized in God. Cicero usually speaks of " God " simply, but sometimes of " the gods ". The Romans and the Greeks lacked that vivid sense of the personal and living God which we inherit from the Hebrew Scriptures. By " God " or " the gods " Cicero means the Power or Powers that ultimately rule the universe. Unlike those theologians who speak of God as " the wholly Other " Cicero declares that reason or *ratio* is a term common to both God and man.[11] The soul or *animus* was generated in us by God; hence there is a relationship, even a *genus*, which links man to the celestial beings.[12] All men must believe in some sort of God, for man recognizes God because in a way he recognizes his own Source,[13] and " this universal world (*universus hic mundus*) is to be deemed one State common to gods and men ".[14]

This universal State is the product and expression of that reason of which we are conscious within ourselves, and the effects of which we detect in the order of the heavens and the ordinances of earth. A rational universe is a universe of law. Right reason, then, is identical with law.[15] Virtue in man is conformity with reason; it is the fulfilment of his rational nature; it is his nature

[5] I, 18, 48.
[6] I, 15, 43.
[7] I, 15, 6.
[8] I, 5, 17.
[9] I, 7, 22.
[10] *Ib.*
[11] I, 7, 23.
[12] I, 8, 24.
[13] I, 8, 24 f.
[14] I, 7, 23.
[15] *Ib.*

perfected and brought to its highest possibility (*perfecta et ad summum perducta natura*). Man has therefore a similitude to God.[16] Man is born for justice; right (*jus*) is constituted not by opinion but by nature.[17] Men have been framed by nature to share with one another the sense of justice and to communicate it generally.[18]

In these passages taken from the first book of the *de Legibus* several words recur which are fundamental to Cicero's thought, and which sum up his untechnical but genuine and not superficial philosophy. These words are *ratio* or reason, *lex* or law, *natura* or nature, *jus* or right, and all these are aspects of one single reality. Law is but an aspect of reason and of nature.

We may conveniently start from the concept of nature. Nature is the order of the universe; the nature of any particular thing is that which it is when it realizes its immanent meaning, when it takes its due and proper place in the universe, when it is, in fact, what it ought to be. To live according to nature, then, is the supreme good for man as for any other living thing—*ex natura vivere summum bonum est.*[19] Nature demands of us that we live "by virtue as by a law".[20] Thus *jus* or right has its source in nature,[21] and the natural order is governed by the might or the nature or the reason or the mind or the will (we may choose which term we prefer) of the immortal gods. *Jus* or right is derived from *lex* or law, and law is "a force of nature"; it is "that mind and reason of the prudent man, that rule of right and wrong".[22] Law is *prudentia*, which perhaps has best been translated "intelligence".[23] This applies to human law when it is good law as also to what we should call today the laws of nature, for both types of law are a reflection of that intelligence or reason which runs through the universe and constitutes it as such and is common in some measure to God and man. Thus the laws of a beehive may be dictated, as we say, by instinct, and the laws of a State by legislation, but when the State and the beehive are what they ought to be, both types of law are an expression of reason and intelligence in the ordering of societies and the purposes of nature. The laws of nature or science,

[16] I, 8, 25.
[17] I, 10, 29.
[18] I, 11, 33.
[19] I, 21, 56.
[20] *Virtute tanquam lege*, I, 21, 56.
[21] I, 6, 20.
[22] I, 6, 19.
[23] I, 5, 19.

politics, ethics, jurisprudence and theology are intimately connected. "For there was", says Cicero,[24] "a Reason that proceeded from the nature of things, impelling to right action and deterring from wrong, a Reason that began to be law, not when at last it was written down but at the moment when it arose, and it arose simultaneously with the divine Mind; wherefore the true and principal law, apt to command and to forbid, is the right Reason of Jupiter the Supreme."

Thus no written law compelled Horatius to hold the bridge against the full force of the enemy that it then might be cut behind him. But he acted according to nature, according to the true nature of man, according to man's immanent law; he was obeying the *lex fortitudinis*.[25] Again, the rape of Lucretia by Sixtus Tarquinius may have been no breach of any written law, but it was despite done to "that eternal law", which is the law of nature,[26] or, as the Apostle might say, that law which is written on the heart of man as man; it was an offence against "the most elementary standards of human morality", as General Rudenko put it. Law in this sense is that supreme law which pre-existed both written law and the State itself.[27] This law is an expression of nature—*ita fit ut nulla sit omnino justitia, si neque natura est*.[28] "Only a madman", says Cicero,[29] "could maintain that the distinction between the honourable and the dishonourable, between virtue and vice is a matter of opinion, not of nature." The law that summons us to good and forbids evil has a force which "is not only older than the age of peoples and of States but is coeval with that God who observes and rules both heaven and earth".[30]

It may be urged that "law" is here used in a different sense from that of the courts. This objection Cicero, the practising advocate, understood. His point, however, is that the law which is administered in the courts derives its origin and its sanction from the eternal law of right and justice, which is at once the law of God and the law of nature. This ultimate and true law can neither be taken away nor abrogated—*neque tolli neque abrogari potest*[31]; it is a matter of nature—*jus in natura positum*

[24] II, 4, 10. [25] II, 4, 10.
[26] *Ib.* [27] I, 6, 19.
[28] I, 15, 42. [29] I, 17, 45.
[30] II, 4, 9. [31] II, 5, 14.

est [32]; it is an expression of the mind of God—*divina mens summa lex est.*[33]

Nature, says Cicero, is the *norma*, the measure, of law,[34] and nature is an expression of reason; " for what is more true ", he says,[35] " than that no man should be so stupidly arrogant as to suppose that reason and mind are to be found in himself and not to suppose that they are to be found in heaven and earth, or to suppose that those things which are scarcely to be comprehended by the highest reason of the intellect are not themselves set in motion by reason? " His conclusion is interesting, and the word he uses is surprising: " he is less than a man who by the consideration of nature is not moved to gratitude ". " Since all things that have reason ", he continues, " stand above those that are devoid of reason, and since it is blasphemy (*nefas*) to say that anything stands above the universe as a whole, we must admit that reason is inherent in the universe ", and this is the starting point (*proœmium*) of law [36]; for natural right (*jus naturale*) is the supreme reason immanent in nature (*ratio summa insita in natura*), which commands those things which ought to be done and forbids their contraries.

The dignity of law arises from the dignity of its source.[37] " What is there, I will not say in man but in all heaven and earth, more divine than Reason, which when it is grown up and perfected is properly called Wisdom? " Now the law is right reason; hence by law we men are consociated with the gods. Certainly Cicero magnified the office of a lawyer! Again, " I observe that this was the opinion of the most wise, namely, that law was neither excogitated by the wit of man nor was something known of the peoples, but was somewhat eternal that ruled the universe, a wisdom consisting in command and prohibition. Thus they said that the principal and ultimate law was the Mind of God compelling and forbidding all things by Reason; hence that law which the gods gave the human race is right and praised, for it is the Reason and Mind of the wise apt for command or for deterrence ".[38]

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[32] I, 12, 34.
[33] II, 5, 11.
[34] II, 24, 61.
[35] II, 7, 16.
[36] *Ib.*
[37] I, 24, 63.
[38] II, 4, 8.

The right way to live (*doctrina vivendi*) may therefore be deduced from law, that is, from the eternal, immutable law which is Reason, Nature and the Will of God.[39] He who knows himself will feel that he has within him a spark of the divine (*aliquid divinum*), and will regard the understanding which is his as a kind of dedicated image.[40]

In one of his speeches [41] Cicero refers to that right " which Jupiter himself consecrated, that all things which are salutary for the State should be reckoned legitimate and just. For law is nothing else but right reason drawn from the divine nature of the gods, commanding things honourable and prohibiting their contraries ". Law is that which holds societies together. This is law in our ordinary sense of the term, yet it is no mere code of rules; it is something spiritual set in the nature of man and the purpose of the world. The legal system is, or ought to be, an expression of the ethical, which is also the natural, basis of society.

Law is essentially an expression of justice. But, says Cicero, the practical man of affairs,[42] " what folly it would be to suppose that everything is just which is laid down in the institutions and laws of men ! " He does not deny that any law promulgated in due form by the proper authority is in some sense law, yet it may be a denial of the real nature and meaning of law. A band of brigands, he says, can agree upon rules whereby they will order and govern their nefarious way of life, but such rules are a denial rather than an expression of what law is in its essence. He suggests an ingenious simile [43]: suppose you go to a doctor, and he looking very wise writes down in his unintelligible jargon what you are to drink, and you take this paper to a chemist, and he makes up the potion and you drink it, and then find that you have taken poison; was it a prescription that the doctor gave you? In a sense it was. A dose written down by a doctor to be made up by a chemist is a prescription. Yes, in some sense it must be called a prescription; yet the whole meaning and purpose of a prescription is that it should be for the advantage and healing of the patient.

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[39] I, 22, 58.
[40] *Simulacrum aliquod dicatum*, I, 22, 59.
[41] *Philippica* XI, 12, 28.
[42] *de Legibus* I, 14, 42.
[43] II, 5, 13.

We may not say that an unjust law, which is like a prescription of poison, is no law; yet if a law do not aim at justice and be not in some sense an expression of justice, of a right and due relation between men, it is really a denial rather than an expression of law. Regulations which do not aim at the public weal, says Cicero,[44] are anything rather than laws. Tyrannical and unjust laws are *leges nullæ*.[45] The very idea of law involves the purpose and concern to choose what is just and true.[46]

The universe, because it is a universe and not a multiverse, is a system and expression of law and order. This ultimate and supreme law is an expression of Reason or of the Mind of God; and because God is the Creator of the universe, this law or inherent reason in things is their true nature. Nature, Reason, the Supreme Law therefore are interchangeable terms. Human laws are such only in a secondary sense; they are expressions of human reason; they aim at the welfare of the citizens, the security of States, the peace and prosperity of man.[47] "And rightly", says Cicero,[48] "was Socrates accustomed to execrate the man who first disjoined law from *utilitas* or the public advantage, for this, as Socrates used to complain, is the fountain of all disaster."

Cicero thus held a consistent philosophy of law upon an ethical and religious basis. He related law and therewith society to the nature of man and to the order of the universe as a whole. He would have no truck with modern relativism in politics or ethics. Excellence, he says,[49] is complete rationality —*est virtus perfecta ratio*—which assuredly is immanent in nature—*quod certe in natura est*. The excellence of a horse or of a tree is not a matter of opinion but of nature; so also the excellence of a man, and so also, we may add, of a society. Elsewhere he says,[50] "for to whom reason is given by nature, to them also is given right reason, therefore law also; for law is right reason in the matter of commanding and forbidding; and if law, then a sense of justice (*jus*) also; and to all is reason given; a sense of justice therefore is given to all". Here we

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[44] II, 5, 11.
[45] II, 5, 14.
[46] *Vim et sententiam justi et veri legendi*, II, 5, 11.
[47] II, 5, 11.
[48] I, 12, 33.
[49] I, 17, 45.
[50] I, 12, 33.

find together these key-words of his philosophy—reason, justice, nature, law. Such in outline is the philosophy of law which the West inherits from classical antiquity, and which being joined to the ethical and religious insights of the Bible was the foundation of Western thought through many centuries till recent times.

CHAPTER IV

The Medieval Construction—I

The Eternal Law and the Law of Nature

The philosophy of Cicero, taken over in substance by the medieval Church, was fructified and developed by reference to the Christian Scriptures. As Cicero may be taken as representative of the classical tradition, so in the main the great Jesuit theologian-jurist Suarez may be taken as representative of the Christian reconstruction, which was dominant in the medieval period.

It is natural that medieval theorists should have given greater precision to the idea of the *lex æterna*, partly because they had a far more vivid sense of God as personal than had the classical authors, and partly because they thought of God as directly the Author of positive divine law in the Bible. Again, the Church of the West tended to interpret the Christian ethic in legal terms. Christ, for instance, as one of the Advent Antiphons calls him, was conceived as *rex et legifer noster*, our King and Lawgiver. Perhaps for this reason we note a change of emphasis. Whereas Cicero regarded law as the order of the universe and only in a secondary or even popular sense as jurisprudence, the Schoolmen tended to regard law primarily as legislation and as a term only applicable in some secondary sense to the order of the universe.

I

In respect of the "eternal law" of God it is convenient to start from an often cited chapter in the Book of Proverbs (viii). The speaker is Wisdom, the divine *Sophia*, alternatively called *Logos*, conceived at least quasi-personally. Wisdom tells of her pre-existence before Creation: "I was set up from everlasting, from the beginning, or ever the earth was. . . . Before the mountains were settled, before the hills was I brought forth" (vv. 23, 25). "The fear of the Lord," says Wisdom, "is to hate evil: pride, and arrogancy, and the evil way, and the froward

mouth, do I hate. Counsel is mine, and sound wisdom; I am understanding; I have strength. By me kings reign, and princes decree justice. By me princes rule, and nobles, even all the judges of the earth" (vv. 13–16). The universe is an expression of the divine Wisdom and Purpose, that is, of Reason and Will. This Wisdom of God, which is also the Will of God, is the source of the authority of kings and judges; they exercise authority "by the grace of God", and it is as his servants or vicegerents that they rule.

The eternal law, says Dr. Mortimer,[1] is God's purpose in Creation; it is "the scheme or plan in the mind of God when he created, and by which he governs and judges his creation". Man being a rational creature, politics or the science of government will differ radically in principle from sciences of the lower creatures such as ornithology or entomology, but the ordering of human societies is as much a matter subject to the law and will of God as any other sphere of nature. Modern man is apt to think of humanity as set over against a nature which it is his privilege to subdue to his own purposes; classical and medieval thinkers were more consciously aware that man and his societies are a part of nature. They affirmed God's sovereignty over the whole universe in all its parts.

But sovereignty is a legal term. Is it strictly proper to speak of an eternal *law*? The question is discussed by St. Thomas Aquinas.[2] He considers three contrary arguments. First, it is said that every law is imposed upon persons; but there have not been from eternity those upon whom a law could be laid, for God alone is from eternity; there can be, therefore, no *lex æterna*. Second, it is argued that promulgation is of the essence of law; but promulgation could not be from eternity, for there was none for whom it could be promulgated. This is much the same as the first argument. Third, it is argued that law involves an ordering to an end (*ordinem ad finem*). But there is no eternal thing to be ordered to an end, for only the ultimate end is eternal. Therefore, once again, there can be no *lex æterna*. St. Thomas answers that things which do not exist in themselves exist with God as the objects of his pre-ordination; second, that the promulgation of the "eternal

[1] *The Elements of Moral Theology*, p. 8.
[2] *S.T.*, Ia, IIae, q. XCI, art. 1.

law " cannot, it is true, be eternal in respect of the creature for whom it is promulgated, but the promulgation itself is eternal in the eternal Word; and, third, that the end of the divine government and therefore of the divine law is God Himself. In respect of men he says that " a law is nothing else than a dictate of practical reason (*dictamen practicæ rationis*) on the part of a prince who rules some perfect " (that is, complete) " community ". Granted that the world is ruled by the divine Providence, he goes on, plainly the whole community of the universe (*tota communitas universi*) is ruled by the divine Reason. Now this government has the nature of law (*rationem legis*), and, since the divine Reason is eternal, we may properly speak of an eternal law.

There is, in fact, a certain awkwardness, though St. Thomas does not say this, in speaking of an " eternal law ". It may be more convenient to speak of " Providence ". On the other hand, there is today a certain advantage about the term " law "; for we customarily speak of the " laws of nature " in the natural sciences and even of " economic laws ". It is well that we be reminded that the law of righteousness is as inexorable as the law of gravitation. We are, as a matter of fact, wont to speak of " the moral law " as we speak of the ceremonial law or the canon law or the civil law. By the " moral law " we mean the requirement of justice, mercy, integrity and the like. The medieval schoolmen following the tradition of the writers of classical antiquity believed that these requirements are no mere conventions but belong to the structure of the universe, in the sense that their neglect or violation brings inevitable disaster on men and States :

sequitur superbos ultor a tergo deus;

they believed that the moral law, as man apprehends it, is an aspect of the will and mind of God, that human legislators therefore cannot with impunity neglect these principles, that politics must be ethical, and that jurisprudence must be concerned to be an expression, so far as possible, of eternal and perfect justice. This is certainly not the only view that can be taken; but it should be considered whether, if there be no God of eternal righteousness, the law can bind in conscience, and whether there can be stable government where obedience to the law is not a matter of conscience with the citizens.

Theology, says Suarez in the Preface to his *Treatise on Laws and God the Law-giver*, " has in view man's last end and sets forth the way whereby he may attain it. Man attains his last end by rectitude, and rectitude depends largely upon law as the rule of human action ".[3] Moreover, Scripture requires us to obey the powers that be as ordained of God, for law flows either directly from God or through his ministers and vicars, the human law-givers.[4] The authority of all law, therefore, is to be derived from God. Theology is concerned with law in respect alike of its origin and of its final end.[5] Law, he says, " is a certain measure of moral acts, in the sense that such acts are characterized by moral rectitude through their conformity to law, and by perversity, if they are out of harmony with law [6]; again, " civil jurisprudence is nothing other than an application, or extension, of moral philosophy to the rule and government of the political conduct of the commonwealth ".[7] Theology is concerned with " natural law " as subordinate to the supernatural order, and with civil laws as determining the obligations of conscience.[8] Suarez seems here and there to suggest that morality in a citizen is to be identified with obedience to the law, as if the content of the law were not a matter of ethics; but such is not his meaning. " Law ", he says,[9] " is a measure of rectitude "; an unjust law is not properly a law at all and can be called such only by analogy ".[10] There are many wicked laws, but strictly and absolutely " only that which is a right and virtuous rule can be called law ".[11] The " eternal law " is the prototype and sanction of all other law.

The " eternal law " is defined by Suarez [12] as a " rational principle existing in the mind of God and governing the universe "; it is in fact the essential principle of God's Providence. Human law is called " positive " because of the proximate source from which it flows.[13] The human legislator is only the proximate source of positive law, because every human law " is in a certain sense traced back to the eternal law "; thus Plutarch says, " Justice is the end of the law; law is the work of the prince, and the prince is the image of God governing the

[3] P. 14, all page references to the Clarendon Press translation.
[4] *Ib.*
[5] P. 16.
[6] P. 24.
[7] P. 15.
[8] P. 16.
[9] P. 25.
[10] *Ib.*
[11] P. 24.
[12] I, 3, p. 39.
[13] I, 3, p. 47.

universe ".[14] The eternal law " is God himself and therefore has no cause "[15]; all laws are effects in some way of the eternal law and so participate in it as to derive from it their binding force.[16]

Law, then, is essentially an expression of reason, not the dictate of arbitrary will. Two qualities are requisite to law, says Suarez[17]: it must be just and congruous with reason, and it must possess efficacious binding force. Now, all created reason is a participation in the eternal Reason, and all human power is from above. The " eternal law ", says St. Thomas Aquinas,[18] is Reason dwelling in the mind of God, whereby all things are directed to their proper ends through means in harmony with those ends. " The rational principle inherent in divine Providence ", writes Suarez,[19] partakes of the nature and the name of law. The ordering of human society is not apart from the divine Providence; jurisprudence, therefore, is ultimately an expression of the divine Reason. Law is not to be sundered from Reason and from Righteousness, and all these have their source in the Being of the living God.

It is not here suggested that Suarez' intimate linking of positive law to the eternal law is directly applicable to legal systems as they have inevitably been developed in the complicated ordering of modern societies. But we may well consider whether there is any guarantee that law will not degenerate into tyranny as the expression of arbitrary human will, if all reference to God and the eternal righteousness be eliminated from the first principles of jurisprudence.

II

Modern theories of law are marked for the most part by the abandonment of the classical conception of " natural law ". Suarez treats the subject at length. Plato, he says,[20] understood by natural law " every natural inclination implanted in things by their Creator, whereby they severally tend towards the acts and ends proper to them "; the lawyers, he adds, exclude inanimate nature from natural law, and Suarez himself would exclude the

[14] P. 48.
[15] II, 4, p. 171.
[16] P. 172.
[17] II, 4, pp. 173 f.
[18] *On Free Will*, I, 5, 6.
[19] II, 2, p. 157.
[20] I, 3, p. 41.

animals, since they have not the enjoyment of reason and freedom and are therefore only metaphorically subjects of law.[21] In any case our concern is with " that form of law which dwells within the human mind ".[22] It is, as St. Thomas says,[23] " a participation in the eternal law on the part of the rational creature ", or, as Suarez puts it,[24] " the natural law is the first system whereby the eternal law is applied or made known to us ". It is so made known to us in a twofold way, by the natural light of reason and by the Decalogue. It was a great moment in the history of European thought when the Fathers of the Church identified the " natural law " of the Stoics with the moral law of the Old Testament. Thus they were able to take over the great ethical, legal tradition of classical antiquity and to quicken and fructify it by relating it to the will of the living God of righteousness to whom the Old Testament bears witness.

Natural law is real law, says Suarez.[25] It is therefore not identical with the rational nature as such. " Conscience, as is evident, is an exercise of the reason "; conscience testifies that a man does well or ill as he obeys or resists " the natural dictates of right reason "; such dictates, then, have the force of law; they constitute natural law, which is a kind of participation in the eternal law.[26] The natural law, he continues, resides in man, not in God, for it is temporal and created. Being written upon the heart, it is not external. It does not dwell immediately in human nature as such, for it is not found in infants; nor does it reside in the will, for it does not depend upon the will but rather coerces it; hence we conclude that the natural law resides in the reason.[27] Man should be ruled by right reason, that is to say, by the natural law. That the natural law is not identical with conscience is further indicated by the fact that the natural law is in general terms, whereas the conscience deals with particulars.[28] The natural law is called the law of the mind.[29] God is rather the Efficient Cause and Teacher of the natural law than the Lawgiver in the strict sense,[30] but, since he is the Author of the natural law, natural law is truly and properly divine law.[31]

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[21] II, 2, p. 159.
[22] I, 3, p. 42.
[23] *S.T.*, Ia, IIae, q. XCI, art. 2.
[24] II, Intro. p. 143.
[25] II, 5, p. 181.
[26] II, 5, p. 184.
[27] II, 5, p. 185.
[28] P. 187.
[29] II, 6, p. 208.
[30] P. 189.
[31] P. 198.

Cicero[32] defines natural law as "that which is imparted to us, not by mere opinion, but by a certain innate force"; of this the Scriptural analogue is the often cited passage from Psalm IV, 6, *Quis ostendit nobis bonum? Signatum est super nos lumen vultus tui, Domine.*[33] The natural law is the divine signature on man.

What, then, is the content of this natural law, how far does it extend? Is it confined to such general precepts as the Golden Rule, or does it include such particulars as "a deposit must be returned"?[34] Suarez answers[35] that "the natural law embraces all precepts or moral principles which are plainly characterized by the goodness necessary to rectitude of conduct, just as the opposite precepts clearly involve moral irregularity or wickedness". Precepts falling under the natural law, he says, can be divided into three classes, first, such primary and general principles of morality as that one must do good and shun evil; second, precepts that are more definite and specific yet are by their very terminology self-evident, as that justice must be observed, and that God must be worshipped; third, "conclusions which are deduced from natural principles by an evident inference, and which cannot become known save through rational reflection"; of these, he says, some are more readily recognized than others and by a greater number of persons, as, for instance, the wrongfulness of adultery and theft.[36]

Suarez was not altogether unaware of the vast diversity of moral judgments which has led many in modern times wholly to abandon the conception of natural law. If it be objected that theft was not regarded as wrong among the Germans,[37] or adultery among the Lacedæmonians,[38] Suarez replies that "natural law, in so far as relates to its substance, is one and the same among all men, but that, in so far as concerns the knowledge of it, that law is not complete, so to speak, among all".[39] His reply is reasonable enough. There are laws of husbandry which are only gradually and painfully learnt by mankind, and which, as our modern "dust-bowls" show, may be forgotten by mankind; but the fact that even now we do not know all the

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[32] *De Inventione* II, 22.
[33] Who shews us any good? The light of thy countenance is signed upon us, O Lord.
[34] II, 7, p. 209.
[35] P. 210.
[36] II, 7, p. 211.
[37] Caesar *de bello Gallico*, IV, 23.
[38] Plutarch, *Lycurgus*, XV, 6.
[39] II, 8, p. 220.

laws of husbandry does not mean that the husbandman is not bound, so far as he would be a true husbandman, to obey the laws which we do know in so far as we do know them. The laws of living well and wisely are binding in so far as we are aware of them, and our awareness may well grow, even though it remain still partial.

Natural law is not a code and cannot be codified. It has to be applied through positive law.[40] But are there positive obligations of natural law to which there are no exceptions, or, if the natural law is only applicable in those particular circumstances where it should be applied, is there such a thing as natural law at all? By natural law, says Suarez,[41] a man may not marry his sister; but in the extreme case of the necessity of preserving the species he might marry his sister; but this, he adds, would not be an instance of equity but of a lapse of obligation through a defect in the subject-matter. Thus the natural law Suarez takes to be immutable in itself but liable to change in respect of its subject-matter, in such a way that a given action may be withdrawn from the obligation imposed by natural law with respect to it.[42] Thus, for instance, we must not say that the return of a deposit is required by natural law; natural law requires that a deposit be returned when duly, reasonably and properly demanded.[43] So St. Thomas says[44] that by natural law a deposit shall be returned—but not if it is to be used for harming the commonwealth. The principles of natural law, says Suarez,[45] are unchanging but not necessarily and under all circumstances the conclusions to be drawn from those first principles. Thus the precept of the natural law concerning the keeping of secrets may be violated if such violation be necessary for the defence of the State or of an innocent person; similarly the natural law lays down "Thou shalt not kill", yet killing is permissible in self-defence.[46] It might well seem that with all these qualifications the term "law" is not in this context very conveniently employed.

The natural law has to be expressed and applied in positive law; yet the two can never coalesce. Thus, for instance, a

[40] I, 3, p. 48.
[41] II, 16, p. 322.
[42] II, 13, p. 262.
[43] *Ib.*
[44] *S.T.*, Ia, IIae, XCIV, art. 5.
[45] II, 13, p. 261.
[46] *Ib.*

marriage that is an offence against natural law, in Suarez' judgment, because contracted despite a vow to remain unmarried, may be valid by statute law, or, again, a sale is not invalidated because it involves an unjust price.[47] Further, Suarez would seem to draw a distinction between ideal natural law or natural law as binding upon man in a state of innocence and natural law as applicable to fallen human nature and historical human society. Thus communism in property might appear a requirement of natural law in a state of innocence; but the division of property, though unideal, is not in itself positively forbidden by natural law, and therefore, when the division has been made, natural law forbids theft; similarly the duty of servants to obey their masters, which the natural law requires, presupposes slavery which, like the division of property, is not intrinsically ideal.[48]

We might infer from a consideration of all these obscurities that it would be better to abandon the term "natural law" and speak only of general principles of morality. But there would be loss as well as gain in such a change. "Morality" is an abstract term pointing to an ideal of conduct; "law", the correlative of duty, clearly points to obligation, and "natural" connotes that the duties imposed by this law are not alien to humanity but pertain to human nature as such, being universal, inescapable and binding.

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[47] II, 12, pp. 254, 257.

[48] II, 14, pp. 276 ff.

CHAPTER V

The Medieval Construction—II

Positive Law and the Law of Nations

I

In the second book of his *Treatise on the Laws and God the Law-giver*, Suarez deals with the *jus gentium* or law of nations. This occupies an indeterminate and intermediate ground between natural law and positive law. As a Stoic term *jus gentium* really means the supposed common practice of mankind rather than any body of positive law, and such is its meaning in Gaius and classical legal literature.[1] Thus the Digest says that the *jus gentium* is the name given to that law " which natural reason has established for all mankind and which is uniformly observed by all men ".[2] Illustrations of this *jus gentium* are reverence towards God, obedience to parents or to the call of one's country, the repelling of violence and injury.[3] As further illustrations the Digest gives slavery, manumission, wars, division of property, ownership rights, commercial intercourse, buying and selling, letting and hiring.[4]

But already we are involved in some difficulty. The first set of illustrations would seem to identify the *jus gentium* with the law of nature, as is indeed implied in various classical texts.[5] But war, slavery and commercial intercourse, which involve organized and morally imperfect societies, are not of natural law in the same sense as is the requirement of justice. Hence, says Suarez,[6] some jurists have held that *jus gentium* has two branches, the primary, which falls under the natural law, and the secondary which is a matter of positive, human law. For himself,

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[1] *v.* Schultz, *op. cit.*, p. 137; Buckland, *The Main Institutions of Roman Private Law*, p. 113. Gaius I, 1.
[2] I, 1, 9.
[3] Digest, I, 1, 2, 3.
[4] *Ib.*, 4 and 5.
[5] Digest, XVI, 3, 31. Inst. II, 1, s. 1, 11 and I. 2, s. 11. On the very complicated and uncertain questions of the interpretation of *jus naturale* in the Digest *vide* D'Entrèves, *Natural Law*, pp. 24 ff.
[6] II, 19, p. 344.

he maintains [7] that the precepts of *jus gentium* were introduced by the free will and consent of mankind and therefore were not written on the hearts of men by God the Author of nature; hence they belong to positive law, not natural law. The prescriptions of the *jus gentium*, he says [8] follow from natural principles "by an inference less certain, so that they are dependent upon the intervention of human free will and of moral expediency rather than of necessity". Thus the permission of war and questions of the settlement of boundaries come under the *jus gentium*, for such acts are permissible by natural reason but are not necessary in any absolute sense.[9] The prescriptions of the *jus gentium*, then, are introduced by custom and are in accord with nature.[10] The *jus gentium* is so close to nature and so benefits all nations that it has grown almost by a natural process and therefore is unwritten.[11] This *jus gentium* in the strict and proper sense, as distinct from principles of law actually shared by many peoples or laws which are substantially identical in many countries, may not be annulled without universal consent, and this, as Suarez observes, would seem in practice to be barely possible.[12] *Jus gentium* differs from natural law in that it is based upon custom rather than upon nature; it differs from civil law in respect of its origin, its basis and its universal or nearly universal application.[13]

From classical authors of the Roman Empire or from Suarez writing from within Christendom, though a Christendom recently divided by the Reformation, we cannot derive much light upon our modern difficult questions of International Law. The issues in those days were, or seem to us, relatively simple. Yet in an extended passage [14] Suarez sets forth the moral and religious and metaphysical principles apart from which, as it might appear, there can be no International Law other than agreements between particular nations. "The rational basis, moreover, of this phase of law", he writes, "consists in the fact that the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity, not only as a species but also as a moral and political unity, as it were (*aliquam unitatem non solum specificam sed etiam quasi politicam et moralem*),

[7] II, 17, p. 332.
[8] *Ib.*, p. 333.
[9] II, 18, p. 336.
[10] II, 19, p. 348.
[11] II, 20, p. 351.
[12] II, 20, p. 357.
[13] II, 19, p. 345.
[14] II, 19, 9.

enjoined by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation.[15] Therefore, although a given sovereign State, commonwealth or kingdom may constitute a perfect community of itself " (that is, a complete community), " consisting of its own members, nevertheless each one of these States is also, in a certain sense and viewed in relation to the human race, a member of that universal society; for these States, when standing alone, are never so self-sufficient that they do not require some mutual assistance, association and intercourse at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need ". Is there in fact, as Suarez supposed, " a certain moral and political unity as it were " of all mankind? If there is such a unity, International Law has a secure moral and metaphysical basis. This is the ultimate question for the International lawyers. It is in the last resort a religious question.

II

We may turn to Suarez' conception of positive law so far as this concerns our present interest.

First, positive law is essentially related to a community. " A multitude of men does not suffice to constitute a community, unless those men are bound together by a particular agreement, looking toward a particular end, and existing under a particular head ".[16] Communities may be " perfect " or " imperfect ". A " perfect " community is such as suffices for the exercise of a full human life. The State is a community of that kind; the family is not, since the family is insufficient for the attainment of human happiness in the mode in which such happiness is humanly attainable. Positive law may be laid down only for a " perfect " community; the family, being " imperfect ", is governed by the power of " dominion ", that is by the *patria potestas*, not by a true power of jurisdiction.[17] Jurisprudence, then, in Suarez' view is a branch of ethics dealing with the life and ordering of a " perfect " community. He recognizes that in fact any particular community may be only relatively or comparatively " perfect ".[18]

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[15] The translator reads *nationis* for the *rationis* of the text.
[16] I, 6, p. 86.
[17] *Ib.*, p. 87.
[18] *Ib.*, pp. 86 f.

Second, law, as defined by St. Thomas Aquinas, is " a dictate of practical reason emanating from the prince who rules some perfect community ".[19] Suarez raises the question whether law as the dictate of the prince and as claiming to bind in conscience can have any rightful place in the world as God intended it. Positive human law as distinct from natural law, he says, is derived from an extrinsic will, not from intrinsic necessity.[20] Is it given to men to bind their fellows by their laws? Is it not written in Scripture that man was given dominion over birds, beasts and fishes (Gen. i, 26)? Dominion over men, therefore, is not natural. The just men, says St. Augustine,[21] were not kings but shepherds and were so called. Moreover, " the Lord is our Judge; the Lord is our Law-giver; the Lord is our King " (Is. xxxiii, 22). Is not man by nature free and subject to none? Further, every true law is binding in conscience, but no man may bind another's conscience.[22] It would seem, then, that kings and princes are usurpers, and that States with their legal codes are a denial of the order intended by God; they are the result of the Fall of man.

Suarez will have none of this. A civil magistracy accompanied by temporal power for human government, he contends,[23] " is just and in complete harmony with human nature ". On the philosophical side he rests upon the Aristotelian principle that man is by nature made for society; on the religious side he rests on Scripture, " By me kings reign " (Prov. vii, 15). A community like a family needs a head. In a " perfect " community there must exist a power of government. It is " a self-evident principle of law " that he who is invested with a given office is invested with all the power necessary to it.[24] In so far as the State rests upon the needs of human nature, it is an expression of the will of God, not a consequence of the Fall of man.[25]

Suarez taught at a time when the world as a whole was subject to more or less autocratic sovereign princes. But while he argues, as we might say, for the divine right of States or organized political communities, he does not argue for the divine right of kings and princes. According to the nature of things,

[19] *S.T.*, Ia, IIae, q. 91. art. 1.
[20] III, Intro., p. 361.
[21] *De Civ. Dei*, XIX, 15.
[22] III, 1, p. 363.
[23] III, 1, p. 364.
[24] III, 1, p. 367.
[25] III, 1, p. 371.

he says,[26] the power to make laws resides in the whole body of mankind collectively regarded. This power was not granted by God to any particular individual [27]; it only resides in territorial communities because in Suarez' time a world community could not be considered as a political possibility.[28] But seeing that such a "general will" as was contemplated later by Rousseau would lead to "infinite confusion",[29] power "by the consent of the community" is bestowed upon the prince. Any particular prince may rule by right of succession, but, if so, he receives the original power with the original obligations [30]; ultimately all power derives from God as the Author of Nature.[30a] Law is the will of the prince, and, since the prince derives his authority from God, the law of the prince, subject to certain considerations, is an expression of the will of God.

III

But much law, as Suarez well knew, arises not from the express will of the prince but out of custom. Such law is also binding in conscience.[31] Indeed, written and promulgated law can be abrogated by custom, as, for instance, through desuetude a law may lapse.[32] Customary action establishes moral obligation or changes established obligations.[33] Four effects may be attributed to custom, the establishment, the interpretation, the confirmation and the abrogation of law.[34] Suarez holds that "ten years is in all cases sufficient for a custom to be held as establishing law or as being validated by prescription".[35] Custom does not essentially require judicial cognizance.[36] But how is customary law related to ethics and the will of God? An evil custom, says Suarez,[37] creates no legal force, and, further, the consent of the people is necessary for the establishment of custom.[38] Thus in the last analysis the source of statute and of customary law is one. The position is not without its difficulties. A custom which becomes binding in conscience may have its inception in an action which, as forbidden by the law, is wrong.

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[26] III, 2, p. 373.
[27] *Ib.*, p. 374.
[28] *Ib.*, p. 376.
[29] III, 4, p. 383.
[30] III, 4, p. 385.
[30a] III, 3.
[31] VII, 16, p. 577.
[32] VII, 18, p. 590.
[33] VII, 1, p. 445.
[34] VII, 14, p. 561.
[35] VII, 15, p. 568.
[36] VII, 11, p. 534.
[37] VII, 1, p. 445.
[38] VII, 10, p. 529.

In this case the initiators of the custom are to be condemned, but their successors may rightly obey the custom deeming that the law has ceased to be observed for some reasonable cause.[39]

IV

But, while Suarez finds a place for consuetudinary law, he tends in general to think of law as essentially the act of the law-giver's will. Yet law is not a mere act of will. "It is part of the character of law that it be just."[40] Acts are not just for the reason that they are prescribed by law; they must be prescribed by law because they are just. A precept commanding that which is intrinsically evil is not law "inasmuch as it lacks the force or validity necessary to impose a binding obligation"[41]; for all legislative power is derived from God, and an inferior cannot impose an obligation contrary to the law and will of his superior[42]; "by me kings reign, and law-givers decree just things".[42a] True, an act which in itself is neither good nor bad may become such as it is commanded or prohibited by law, as in the case of legislation concerning the bearing of arms, but a precept commanding an offence against God cannot licitly be obeyed.[43]

A law that is contrary to reason and justice is no true law and carries no moral obligation. Precepts of this sort, says St. Thomas Aquinas,[44] "are manifestations of violence rather than laws, and therefore they are not binding in conscience". This seems at first sight a very dangerous doctrine. Is a man to be at liberty to refuse obedience to a law if in his judgment it appear unreasonable or unjust? Such a principle would lead to utter chaos and lawlessness. But Suarez is concerned with legal theory. All doctors agree, he says, that a law must be obeyed unless there is moral certainty of its injustice, for the law-giver has superior right, he has counsel to advise him and reasons which may be unknown to the ordinary citizen, and otherwise there would be general licence to disregard laws with the consequent collapse of civilized society.[45] The right and duty to resist an unrighteous law was in fact, as Maitland says, a nullity.

It is of the essence of law that it be an expression of justice. In any particular case there may be great difference of opinion as

[39] VII, 18, pp. 606 f.
[40] I, 4, p. 54.
[41] I, 9, p. 107.
[42] *Ib.*
[42a] Prov. viii, 15.
[43] I, 9, pp. 108 f, 113.
[44] *S.T.*, Ia, IIae, q. 96, art. 4.
[45] I, 9, p. 113.

to whether a law is just or unjust, but in principle, unless it aim at justice, it is no true law. But what constitutes a law good or bad, just or unjust? Suarez answers that "it is inherent in the nature and essence of law that it be enacted for the sake of *the common good*". In support of this principle he cites St. Thomas Aquinas, Cajetan, Aristotle, Plato, Cicero, Plutarch and others.[46] "The first principle of moral operations", he argues,[47] "should also be the first principle of law"; now the first principle of moral operations is the promotion of happiness; therefore the first principle of law must be the happiness or welfare of the community. It is for the sake of the common good that the law-giver receives his power; this he receives from God and through the people.

It is objected that some laws aim, not at the common good, but at the good of particular persons such as wards or soldiers, that some are purely personal as when privileges are granted, and that many laws inflict injuries on certain individuals.[48] Suarez replies that one phase of the common good refers to things enjoyed in common, such as temples or magistracies or common pasture-lands; another phase refers to what is to the general advantage, whether it be to the advantage or disadvantage of particular persons.[49] Thus, if a prince decree the payment of a tribute to himself, which is a species of privilege, it is good law provided that it be just and serve the common good, for he is *persona publica et communis*; if the imposition were unjust it would be tyrannical and not law.[50] For its proximate subject-matter a law may look to the private good of a family or household or particular individuals, but from a formal standpoint it must look to the common good. Thus taxation is money paid ultimately for the common good; but it is a principle that "the harm to private individuals should not be so multiplied as to outweigh the advantages accruing to other persons."[51]

Law must serve the common good, but must the common good be deliberately aimed at? Can the essence of law depend upon the intention of the law-giver? Suarez replies[52] that "for

[46] I, 7, pp. 90 f.
[47] *Ib.*, p. 92.
[48] I, 7, pp. 93 f.
[49] *Ib.*, p. 94.
[50] I, 7, p. 97.
[51] I, 7, pp. 98 f.
[52] I, 7, p. 95.

the validity and essence of a law it is necessary only that its subject-matter be advantageous to, and suitable for, the common good, at the time and place involved, and with respect to the people and community in question". The utility and fitness of laws are not bestowed by the law-giver but "are assumed to exist"; the precept of a law-giver legislating in hatred, therefore, is good and valid law if it work to the common advantage,[53] and it would appear that a law must be assumed to serve the common advantage unless manifestly and by general consent it be unfair and tyrannous.

If, whatever the motive of the law-giver, it must be assumed, except in very rare and plainly tyrannous cases, that the law serves the common good, what is left of the principle that jurisprudence and legislation are branches of ethics? Suarez confines himself to theory here, and his doctrine is small comfort to those seeking justification for resistance to laws they deem unjust. He is concerned with the basis of a stable, or even a possible, civilization. If it is agreed by judges and legislators that they are bound to the best of their insight and ability to seek the common good and the ends of justice, then law rests upon a moral basis, and obedience to law is a matter of conscience. Upon these principles, though there be violent disagreement in respect of particular laws whether in fact they are just or in fact promote the common good, yet civilization is possible. Abandon these principles, and the result is tyranny or anarchy, anarchy presumably first and tyranny inevitably as its outcrop. So far from being merely theoretical and doctrinaire, therefore, these principles may be deemed of the highest practical importance throughout the habitable world.

Thus, having shewn that positive law presupposes a community, a more or less "perfect" society, Suarez has related positive law to his general philosophy. The source of all legitimate, human, positive law as binding in conscience is the *lex aeterna* in the mind of God. Of this eternal law of God the natural law, written on the hearts and consciences of men as rational creatures, is a partial transcript or rather an adaptation to the needs of human nature. The natural law is to be expressed in politics and in jurisprudence as a branch of ethics. It is the

[53] I, 7, p. 96.

will of God that human life should be organized politically and juridically, because only in this way can man's nature attain to its full possibilities. Ideally the whole human family should organize itself as a unity, but, since this is practically impossible, mankind must be organized in various political communities. Such communities must have a head, a prince, or, as we should say, an organ of government. Such government therefore rules by the will of God, and obedience to the law is part of our obedience to God.

CHAPTER VI

Modern Jurisprudence—I

Austin, Kelsen and Duguit

From the classical age of the Graeco-Roman world till the modern period there was broad agreement amongst those considered wise as to the theological and philosophical framework in which jurisprudence had its appointed place. The world of nature and of history is subject to the divine Providence and governance; there is an " eternal law " which expresses the mind and will of God, and which is the source of the order in the universe as a whole as of the immanent law in every created thing. In man, regarded as a rational creature, the eternal law is reflected in that moral law which is written upon his heart or conscience, the law of his nature. In virtue of his reason man is aware of the principles of right and wrong. But this " natural law " is general; it needs adaptation to diverse and changing circumstances; it must be expressed therefore in the positive law of States. No doubt many of the laws of States are mere matters of convenience like the rule of the road or much administrative law, but in principle the purpose of positive law is to express the moral law; jurisprudence, except in so far as it is a mere study of facts, is a branch of ethics; it is, moreover, intimately connected with theology because the " eternal law " is the ultimate source of human positive law through the medium of the " natural law " and the person of the prince regarded as God's vicegerent.

I

Jurisprudence today is not regarded either as a branch of ethics or as a handmaid of theology. In particular, jurisprudence and theology have parted company, and no British theologian has attempted a survey or critique of the many and various theories of jurisprudence, imperative, pure, historical, functional, sociological and teleological set forth by jurisconsults in recent years. It is

hazardous for a theologian to offer even a few hesitant observations on this neglected theme; he will surely be told to mind his own business as a theologian and instructed that the difference between Austin and Savigny, for instance, is a matter upon which a theologian as such is not entitled to publish his opinions, and that to confuse law and theology is to bedevil both. Up to a point these strictures must be freely accepted, but they should not be pressed too far. For instance, the question, "What is Law?", is, as Professor C. A. W. Manning has said,[1] not in itself a legal question; yet it concerns the lawyers intimately. When thousands, or even millions, of Russian peasants are "liquidated" in the interests of Communism, they are disposed of in a legal manner; but in their demise an ethical question is involved, with which the moral philosopher is concerned, and a theory of the value of personality, about which the theologian may be heard. Every system of law rests, at least implicitly, upon an anthropology or doctrine of man, which is rather a theological or metaphysical question than a legal. In so far as these modern theories of jurisprudence are descriptive of the law as it actually is, the theologian as such is in no position to criticize their adequacy or exactitude; but their implicit or explicit doctrine of man is clearly within his province. The autonomy of jurisprudence *in suo ordine*, or within its own soke, is not in dispute, but in the consideration of the place of law and jurisprudence in our total and comprehensive view of life, the philosopher, the moralist, the theologian and many others have an interest. A theologian without impropriety may therefore offer a marginal comment upon jurisprudence.

It will be convenient to start from those teachers who chiefly have stressed the autonomy of jurisprudence and might seem, therefore, at first sight furthest removed from the medieval synthesis, Austin, Kelsen and Duguit. Then the sociological school, of which Roscoe Pound and J. Stone are the most distinguished living representatives, will be briefly considered and finally the *Volksgeist* theory of Savigny. These great teachers must be discussed, not as they are in the rounded fullness of their balanced doctrine, but as they appear in the text-books and are thus known to beginners.

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[1] *Modern Theories of Law*, ed. Jennings, p. 184.

II

It is natural to begin with John Austin (1790–1859) whose conception of law as a rule of conduct imposed and enforced by the sovereign unites him with the Middle Ages as it separates him from so many theorists after him. Suarez had defined a law briefly as " a precept addressed to a community, which is also just, stable and duly promulgated ".[2] Austin would omit from such a definition the word *justum*, not because he personally was unconcerned with justice, but because he would separate ethics from the science of jurisprudence or, to put the matter another way, he distinguished the science of jurisprudence from the science of legislation; it is the duty of the legislator to consider the common good, of the jurisconsult to interpret the law laid down by the sovereign power.

It is protested that, since some laws by general consent have been unjust, we may not insert the word " just " into our definition of law. Thus, Dr. Buckland writes[3]: " To introduce goodness into the definition of a law is like introducing ability to trot into the definition of a horse. A horse which cannot trot is still a horse, though a bad horse. A law ignoring justice is still a law, though a bad law ". This may be accepted, but the same subject may be differently defined in different contexts. For the purposes of chemistry, a human being may, presumably, be defined without reference to man's spiritual nature, and certainly for scientific purposes such as those of Austin law may be defined without reference to ethical considerations; but the lawyer, when his task is to explain to society at large and to legislators in particular, what is the nature and purpose of law will lead his audience far astray, and may bring his country to disaster, if he fails to make plain that an unjust law, though it be in some sense law, is the denial and contradiction of the true nature and purpose of the law. An umbrella that owing to various defects fails to keep out the rain is an umbrella still, but for the normal purposes of human intercourse the function of an umbrella as an ombrifuge must enter into its definition.

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[2] *Lex est commune praeceptum, justum ac stabile, sufficienter promulgatum, de nat. legis*, I, 12 *sub fin.*

[3] *Some Reflections on Jurisprudence*, pp. 33 f.

Austin has suffered many criticisms from his fellow-lawyers. It has been pointed out that his conception of law is too narrow even for the Middle Ages which knew canon law, Roman law, consuetudinary law and the law of merchants, none of which ranked as law proper in Austin's eyes. On Austin's view that custom is not law till it has been so declared by a Court of justice, Dr. C. K. Allen comments [4] that it is "the exact opposite of the truth. Custom is the first and most essential law". It has been pointed out, however, that in a highly developed legal system custom will only be enforceable in the courts if it conforms to standards laid down by the courts themselves, cf. *Goodwin* v. *Robarts*.[4a] Further, Vinogradoff would have it that case law is essentially a declaration of *right*.[5] But J. Stone [6] has pointed to the abstract character of Austin's thought; he quotes Austin as saying, "as principles abstracted from positive systems are the subject of general jurisprudence, so is the exposition of such principles its exclusive or appropriate object. With the goodness or badness of laws, as tried by the test of utility (or by any of the various tests which divide the opinions of mankind) it has no immediate concern".

With Austin's definition of the scope of jurisprudence it is not for the moralist or theologian to quarrel; but his conception of law as the command of the legal sovereign, whether a person or a body, if taken by itself and isolated from the whole context of his thought, is perilous in the extreme. Eliminate "*justum*" from Suarez' definition, identify law with the naked will of the legal sovereign, and there will be no answer to the argument of Thrasymachus in *The Republic* that might is right, and justice the will of the stronger. This is no remote academic question. Adolf Hitler never acted illegally after he came to power. By the *Ermächtigungsgesetz* or Empowering Act of March 23, 1933, he was given the legal right to alter or suspend certain articles in the German constitution; by a further law of the following year he was given authority to frame new constitutional law. In fact, the will of the Führer became the source of law in Germany. He acted always within the constitution. Yet it is

[4] *Law in the Making*, 2nd ed., p. 87.
[4a] (1875) L.R. 10 Ex. 337.
[5] *Common Sense in Law*, p. 150.
[6] *The Province and Function of Law*, p. 70.

not in dispute that his advent to power marked the end of the reign of law as it has been known in Western Europe. Not the theologian only but every private citizen must protest if the textbooks should assert that law may be defined, without reference to justice, as the will of the contemporary sovereign power. There are, indeed, grave difficulties in the way of Suarez' definition of law as *praeceptum justum*, for who shall decide whether or not a precept should be reckoned just? But if justice be not in some way included in the definition of law, or if there be no reference in the definition to that which is transcendent, the negation of law will be covered by the definition. "And if your Highness had not come over, I should have outlived the Law itself".

It should be noted, however, that Professor Manning appears to draw an almost diametrically opposite moral from the consideration of Austin's doctrine. He writes,[7] "After all, the core of his position was that without authority it was not possible for law to stand. And it is precisely the decay in the authority of law that is bound to be so discouraging to any who still look to the ultimate building up of a more rationally integrated world order". But it may be urged on the other side that law has fallen into disrepute in Europe and largely lost its authority because it has come to be disjoined in the minds of men from justice and to be regarded as an exercise of bare will on the part of a tyrant or a dominant class or a political majority. Austin did not in fact belittle justice; but in so far as he regarded justice as a pre-legal question only, he, as represented in the textbooks, has endangered the respect for law as such. Law is not "a mere aggregation of rules"; it is essentially an expression of justice and of right.

But this may be less than fair as a criticism of Austin. It is entirely proper that a professional lawyer in his scientific study of his subject should treat law exclusively from some one aspect such as, for example, a rule of conduct imposed and enforced by a legal sovereign. But when such a definition, posed for scientific purposes, is taken over by the politicians, we are in sight of tyranny; and when the people at large see in law nothing beyond the legislator's will, their reverence for law is lost, and one of

[7] *Modern Theories of Law*, p. 224.

the pillars of national stability is undermined. Therefore in respect of Austin, of Kelsen and other modern teachers the marginal theological comment here offered must not be taken as an impertinent criticism of the scientific labours of these masters of jurisprudence but as an indication of the deadly peril involved in the treatment of scientific abstractions as if they covered the whole field in all its aspects. Unhappily these great teachers have been so misinterpreted with dire results, and the lawyers cannot wholly shift on to the shoulders of the politicians the blame for the disrespect into which the law has so largely fallen, especially in Europe. There is therefore the most urgent need that these important but partial studies be supplemented by, and taken up into, a large and balanced philosophy of law which may serve as a pillar in the reconstruction of the West.

III

The modern repudiation of the classical or Christian-humanist tradition in respect of law is well illustrated by the important work of Hans Kelsen whose influence dates for the most part from the end of the 1914–1918 war. He stands sponsor for the "pure" or unmixed science of law, that is, of law uncontaminated by any infusion of sociology or ethics or theology or politics. It is not to be supposed that Kelsen as a human being is unconcerned with the sociological aspect of jurisprudence or with justice, which he calls an "irrational idea", that is, no doubt, in the German idiom a non-rational or non-logical idea; but his professional interest is in law for itself, by itself, in itself. Whether a law be good or bad, just or unjust, is no concern of the pure science of jurisprudence, for pure jurisprudence is concerned exclusively with the norms or standards set up in the various legal systems, and these in their turn derive from some basic norm of the constitution the validity of which is an assumed hypothesis. This basic norm cannot itself be legally valid, but it gives legal validity to the subsidiary norms derived from it. Any number of basic norms is theoretically possible. The King in Council might be one such norm, or a written constitution, or the will of a Führer. So far as the science of jurisprudence is concerned, it would seem that there is nothing to choose between these norms; each is an "hypothesis" which has utility value.

Kelsen is concerned with law as a logical system derived from a basic norm, whatever that norm may be.

He regards jurisprudence as a directive science. It is concerned, not only with what is, but also with what should be: *Sollen* is his Kantian term. Jurisprudence is thus contrasted with the natural sciences which deal solely with what is. But we should be careful not to translate *sollen* by "ought", which is a moral term. A direction usually points to an end or goal; yet ends or purposes Kelsen regards as meta-legal questions beyond the purview of jurisprudence. The only end contemplated by him would seem to be logical consistency with some basic norm which may be morally, æsthetically or culturally neutral. This is direction, so to say, *a tergo*, logical, not teleological direction. Kelsen's "super-norm", writes Buckland, merely disguises the fact that he had found no ultimate reason why law should be regarded as binding.[8]

Kelsen admits that it is proper to enquire "why one has to respect the first constitution as a binding norm". D'Entrèves, commenting on this, observes that "the recognition that the ultimate test of the validity of law lies beyond law is itself nothing but a natural law proposition".[9] Yet in fact Kelsen identifies law with the State, whatever the State may be. In his exposition of this view he explains that the attempt to set forth a meta-legal theory of the State leads to the same difficulties, obscurities and contradictions as the attempt to assert the transcendence of God over Nature. There are those who claim to be atheists and to repudiate ethics, but whose deeper, if sometimes unconscious, motive is to deny unworthy notions of God and merely traditional ethical conventions. Kelsen's anti-theological bias is possibly to be explained along these lines, for Dr. Lauterpacht speaks of a "prophetic pathos" in his writings suggesting that, after all, his ethical relativism "is itself dictated by the moral idea".[10]

Kelsen in identifying Law and the State would seem to imply that National Socialism was just as validly a legal system and a subject for the consideration of the jurisconsult as, for instance, the British legal system. A theory that sees in Hitler's rule the

[8] *Some Reflections on Jurisprudence*, p. 23.
[9] *Natural Law*, p. 108.
[10] *Modern Theories of Law*, p. 137.

reign of law might appear to stand self-condemned. However hard it be to define in what sense law must be an expression of justice or serve the public good, and however elusive be the notion of "the public good", no theory of jurisprudence can serve the needs of Europe and of the wider world today if it overlook the ends of life which it is the purpose of law to further and secure. The meaning of life, it is true, is a philosophical or theological question, not a juristic; but if a jurist wholly rules out from his consideration the ethical and the transcendent, and therefore disclaims any theory of the nature of man or of the public good, his theory of jurisprudence in effect comes to justify systems which by the common consent of the Western world are the denial and repudiation of all that we normally mean by law.

IV

Had a strictly chronological sequence been convenient, Duguit should have been considered before Kelsen, for Duguit was professor of law at Bordeaux at the very beginning of this century. Like Austin and Kelsen he attempts wholly to sunder jurisprudence from ethics, metaphysics and theology; he rejects, in fact, the medieval synthesis and claims the autonomy of law as a science by itself. But he stands at the opposite pole from Austin, for Austin had identified law with the will of the legal sovereign, while Duguit, so far as possible, divorces law from will. Law in his teaching is an expression neither of will nor of reason, but is rather a declaration of facts. The ultimate for law is not the will of the legislators nor the conscious plans of men but the immanent necessities of society at any particular stage of its complicated development.

Duguit conceives society to be a kind of organism with its own inherent life. The human body is an organism; its health depends upon a certain equilibrium, a stable and harmonious relation of its parts. If a man take poison accidentally or cut his finger, there is a certain *vis sanatrix naturæ*, an immanent healing power in nature, which rallies his forces to eject the poison or to heal the wound. A political society, Duguit affirms, is an organism in which there is a similar inherent healing power. The health, the very existence, of the society depends upon the maintenance of an equilibrium, a harmony, a co-ordination of

its various parts. When an event occurs comparable to the reception of poison into the human body, society spontaneously and inevitably reacts against it and restores the broken harmony. Such is the function and sanction of law, which is not primarily or essentially a code or the will of legislators, and which does not subserve some ethical or philosophical or conscious end, but is the reflex action of society for the preservation of its health. Law, says Duguit, is "the spontaneous product of facts"; it is the necessary and automatic self-regulation of the very complicated organism of society. In Duguit's theory, as Paton puts it,[11] "legislation does not really create law, but only defines that which already exists".

Duguit's theory has been subject to much criticism from the lawyers. "It is certainly not the case", observes Sir M. Amos [12], "that laws have always been secreted by the ductless glands of the community". But the theory has particular value as an indication of the vast change that has come over the practice of law and as a criticism of the old individualistic outlook. In an old catechism, never officially sponsored, the question was asked: "What are laws for?". The required answer was to the effect that "laws are to preserve the rich in the possession of their riches and to restrain the vices of the poor". The framer of that catechism was an indifferent theologian, but he may have been an acute observer of the practice and assumptions of his day. Men, it was thought, should be allowed to do what they liked with their own and to follow the bent of their wishes so far as these did not interfere with the legal rights of others or offend against accepted morality: the law existed to maintain the rights and repress the vices of the individuals who composed society; the common good was thought to be best served by giving to every man the maximum liberty to work his will. Against such a conception of law in society Duguit protested. Not the advantage of individuals but the good of society as an organism is the end of law. Law is not concerned with the morals of individuals except incidentally nor with their supposed rights as individuals; it is the self-adjustment of society to its own inherent needs as such.

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[11] *Jurisprudence*, p. 81.
[12] *Modern Theories of Law*, p. 97.

In this protest Duguit is to some degree supported by our modern conseience no less than by the actual development of law in reeent years. It used to be said that a man could do what he liked with his own; if a traet of land was his, he could ejeet his tenants and at his pleasure turn his fields into a deer forest. We are far from such days now! The change in law may perhaps eorrespond to a change in social necessities; it certainly corresponds to a change in ethical outlook. The ethieal advanee is to be observed in the elass that no longer claims sueh rights. We shall be able to speak of a general ethieal advanee only when other sections of the community shall forgo their power to bring discomfort and suffering upon the whole eommunity and even imperil the national safety by withholding their labour for the enforeement of the " rights " which they allege. So far, then, Duguit's theory may be said to correspond with the actual development of law in certain aspeets and to mark a change in what we may eonveniently, if inaeurately, call the publie conseienee.

It may be questioned whether Duguit's theory marks an advanee on the theoretical synthesis of the Middle Ages; for in the classical-Christian philosophy the end of law was deemed to be *commune bonum*, the good of society as a whole. Moreover, Duguit would seem to fall far short of the medieval construction in the eomplexities or obseurities of his thought of the " eommon good ". He was anxious to divoree jurisprudence from ethics, metaphysics and religion and to distinguish between law and the will of legislators. The law in any situation he held, is an expression of the faets; it is a self-adaptation of society, a reflex action, as it were, where there is danger of disturbanee or disruption. Law is thus essentially related to " the common good " but does not express a deliberate striving after a eommon good conceived in the minds of men; it is not an attempt to achieve an ideal justice. It is, rather, a form of communal self-preservation without reference to the value of the self or its deserving of such preservation. Law is thus a principle of cohesion and self-preservation in a society of any quality whatsoever. This goes far towards identifying right with the convenienee of any order.

It is with this theory that Duguit is primarily identified in the textbooks. But we may not infer that in faet he was

indifferent to, or contemptuous of, ethical values. Moral rules accepted by the whole community, he said, are rules of law; he admitted that man as such recognizes the need for fairness and equality, which therefore must find expression in the law. Indeed, Julius Stone [13] cites this remarkable passage from Duguit's Introduction to the French translation of Woodrow Wilson's "*The State*": "I am of those who think . . . that the primordial fact, to which all social manifestations are traceable, is an act of the individual conscience, that in every case the political writer falls short of his task unless he attempts to determine, by the light of reason and experience, the eternal and stable principle of conduct, binding upon governments, fixing their duties and limiting their actions". Legal commentators have not been slow to point out that, however unavowedly and in however marked a contradiction of his general theory, Duguit seems in effect to be re-expressing the old classical conception of Natural Law. Thus Laski was of opinion that in his theory of social solidarity Duguit probably had in mind "a body of principles which ought to be realized in law"; what he lacked was "a criterion of justice to which the specific commands of positive law must conform".[14]

Duguit as a man must be appraised in the light of his virtuous inconsistencies; but what may be called his textbook theory may be criticized by a theologian as based upon an unworthy idea of human nature. An organic conception of society, unless it be carefully guarded, leads to a depreciation of the concept of personality. It is well to claim that a man has no rights against society in the sense that it is always his duty to consider the advantage of his fellows. That is a moral principle. But if the lawyers, eliminating ethics from their conception of the law, should claim that man has no rights against society on the ground that it is the good of society alone that matters (and this might seem but a step), we are in sight of the ant-hill State where no individual has any value in himself. In some of his sayings Duguit would seem to have justified a polity like that of the U.S.S.R. As Kelsen may be criticized for finding room in his theory for the vindication of the Nazi conception of law, so

[13] *The Province and Function of Law*, p. 349.
[14] *Modern Theories of Law*, pp. 63 f, 66; cf. J. W. Jones, *Historical Introduction to the Theory of Law*, p. 113.

Duguit's strict theory, taken by itself, might seem to justify from the point of view of law the State behind the Iron Curtain. The moral to be drawn is not that Duguit's theory must be wholly rejected by any ethical or religious person, but that when jurisconsults produce a theory of jurisprudence from which they seek to eliminate ethical, metaphysical and religious notions altogether, they end by producing a theory apt to justify a state which by our common consent is the denial of law itself. Law is neither ethics nor religion, but law is not safe, it is not even law, when it is divorced from ethics and religion.

CHAPTER VII

Modern Jurisprudence—II

The Sociological School and the Historical

Austin and Kelsen represent the attempt to expound jurisprudence as an abstract science; law according to Duguit is " the spontaneous product of facts ". Over against these stands the sociological school or, as it might perhaps better be called, the functional school of Roscoe Pound and, with a difference, of Julius Stone. This might indeed be styled the empirical school since its sponsors tend to see law as a process of tinkering, an operation parallel to that of the motor mechanic whose business it is to keep the automobile in good running order. In fact, " social engineering " is a phrase not repudiated by Roscoe Pound himself.

I

An extreme wing of this school is not merely empiricist but also purely relativist. It may be said to rest upon the conception of law indicated in O. W. Holmes' well-known aphorism that " the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law ". Every case brought into the courts is arguable and argued; the decision of the judge is rarely with any certainty to be predicted. Until a case is decided, we may say that the law in respect of that case is a matter, not of fact but of surmise. Lord Wright has said that " there are comparatively few cases in which the relevant rules of law are uncertain. What is more often uncertain is, what is the right rule to apply ".[1] The choice of the right rule is a very personal decision depending upon the outlook, the principles, even, perhaps, the digestion of the judge. Along these lines, therefore, those who are materialists in theory as well as relativists in respect of the law may be parodied as reducing jurisprudence to a form of psychological prognostication, if not of gastronomy.

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[1] Quoted J. Stone, *op. cit.*, p. 139.

But the unpredictability of judicial decision depends less upon doubt as to the rule to be applied than upon the uncertainty of the facts of the case as they will be determined by the jury or the judge; for both jury and judge may be misled by dishonest or muddled or unintentionally inaccurate witnesses. Judges differ far more about facts than about law, and what the judge will regard as the facts of the case no man can foretell. The astringent comments of Judge Jerome Frank [1a] are a valuable corrective to too abstract and ideal a treatment of the law. It is important that we consider philosophically the nature and the ends of law, but it is well to be reminded that in practice law is "a portion of the science of human nature".[1b] Law is essentially a process. Even codified law is not really static, for new situations, sociological, industrial, administrative, are always arising. "Reported cases with comparatively few exceptions", said Lord Wright,[2] "become obsolete in fifty years." Those who press these considerations to extremes would make jurisprudence a purely empirical study, not a rational enquiry. During the National Socialist regime in Germany Dr. H. Frank said [3]: "Only that which the National Socialist Party recognizes as right is right". Hence judges in the German courts in those days were known to base their decisions upon the reported speeches of Cabinet ministers rather than on the written law.[4] Lawyers no less than theologians will regard such conduct as the negation of law; yet it is fully compatible with ethical relativism and juristic empiricism.

II

But the sociological school, as represented by Roscoe Pound and Julius Stone, does not go to these extremes. Its teaching may be regarded as an implicit protest against three earlier positions, first, the medieval synthesis with its transcendental conceptions of law; second, the abstractions of the "pure" lawyers who would treat the law by itself without reference to social and ethical conditions; and third, the extreme individualism of the liberal school of Bentham and his successors.

[1a] *Law and the Modern Mind.*
[1b] *Ib.*, p. 147.
[2] Quoted Stone, *op. cit.*, p. 167n.
[3] *Kulturkampf*, December 10, 1936.
[4] *v.* N. H. Baynes, *Hitler's Speeches*, I, p. 516.

Bentham, indeed, was for extending the range of law, yet he tended to regard law as essentially an infringement of the liberty of the individual, who alone was the subject of pleasure or of pain. The individualism of his period finds classical expression in Herbert Spencer's observation that " every man is free to do that which he wills, provided he infringes not the equal freedom of any other man ". Against this view Stone holds that the conflict of rights with which the law deals is always a conflict of social rights, not a conflict between the rights of the individual and the rights of society. Thus " the ' individual ' interest in free belief and opinion is on its other face vital to the social interest in cultural and political progress and to the maintenance of free political institutions. And it is these which are to be weighed against the general security and existing political and cultural institutions when free speech is threatened. They are the ' civil liberties ' *par excellence* ".[5] Law is an activity of society concerned with its own welfare as a society and weighing one aspect of social interest against another.

It is the main contention of the sociological school that law is essentially relative to social interests, to expediency, to compromise; its function is the avoidance of friction in the body politic. It is therefore a tentative or experimental science rather than one concerned with logical deduction from first principles. " To treat the results of logical deduction from existing premisses as a substitute for the assessment of all aspects of the given situation and notably for its ethical and sociological aspects ", writes Stone,[6] " is essentially an abuse of logic, leading to legal anomalies and distortions." He illustrates his point from the rule or law of common employment, since abolished. The rule was expressed by Chief Justice Erle in *Tunney* v. *Midland Railway Co.*[6a] thus: " a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in discharge of his duty as servant of him who is the common master of both ". This may always have been a monstrous rule; under modern conditions and in the light of contemporary ideas it would, if

[5] *Op. cit.*, p. 519.
[6] *Ib.*, p. 146.
[6a] (1866) L.R. 1 C.P. at p. 296.

strictly interpreted, be unenforceable; hence, before the formal abolition of the rule, the courts could find [6b] that the drivers of two motor coaches serving the same firm and employed upon the same excursion were not in common employment! The law is what the courts decide, and the decision of the courts is not apart from considerations of social interest and the smooth working of the social machine.

III

The judge's task, then, is more than a matter of deduction from established principles; it is a form of social engineering. It may reasonably be claimed that the accommodation of rule and precedent to new situations and conditions is an exercise of justice properly so called. Yet we may feel hesitation when justice in relation to law is defined as " such an adjustment of conduct as will make the goods of existence . . . go round as far as possible with the least friction and waste ".[7] The valuable emphasis upon the empirical element in jurisprudence and legal justice is dangerous unless it be accompanied by reference to the ultimate principles by which the empirical lawyer should be guided. Justice is more than a device for the avoidance of social friction. The engineer's task is to tinker with the car to make it go, but it will not run far or securely apart from the due observation of fundamental principles with which he may not tinker. Jurisprudence may be in large measure an empirical science, but it has transcendental postulates and principles. The avoidance of reference to the transcendent or spiritual in this theory leads to very great obscurity. For sociological jurisprudence, writes Stone,[8] " the gist of the theory of justice is to assess the degree to which *de facto* interests ought, in view of other interests, to be secured ". A grammarian might insist that the act of assessing must be the practice, not the theory, of justice; but, more important, the definition is of little practical service without some further definition of the *de facto* interests and their relative significance; and whence comes this small word " ought " into the definition? " Ought " is correlative to duty

[6b] *Radcliffe* v. *Ribble Motors, Ltd.* (1939), 55 T.L.R. 459.
[7] Roscoe Pound, *Social Control Through Law*, p. 65; quoted Stone, *op. cit.*, p. 356.
[8] *Op. cit.*, p. 490.

and to unqualified obligation. We use it sometimes loosely or metaphorically, as when we say, " if you want that car to run smoothly, you ought to adjust the brakes ", but what we really mean is, " if you want that car to run smoothly, you *must* adjust the brakes "; the statement is hypothetical; no question of moral obligation arises from it. If Stone here uses the term " ought " in its proper sense of moral obligation, he has surreptitiously introduced ethical first principles into a theory which purports to be sociological, not ethical. If, on the other hand, he is using " ought " in an incorrect or figurative sense, he is saying that jurisprudence has no first principles of its own but is subsidiary to sociology. But in that case not only is " ought " metaphorical, but so is " justice " also, for justice then means no more than smooth working to unspecified ends and has no necessary moral connotation.

It appears from some passages that Stone would expressly sunder the idea of legal justice from moral obligation. The law, it would seem, is concerned with social utility with which men's actual ethical convictions may often be at variance. Ethical rules he would distinguish from other rules, such as the judicial, " by their association with an *emotion* of obligation or righteousness ". Ethical conviction, he writes,[9] " impels the holder to do whatever is postulated in the conviction regardless of any ulterior end. This is the sense in which the ethical ' ought ' is absolute. And that absoluteness arises not, as the natural lawyers assumed, from the role of the reasoned factors in man's psychological nature, but from those of unreasoned emotion ". The religious and the supernatural, it would appear, belong to this field of unreasoned emotion. This is not very clear, but Stone seems certainly to be denying the intimate connection or ultimate identity of *lex*, *jus* and *ratio* which was fundamental to the thought of Cicero and his successors in the West. If we say that the courts are not concerned with the rights of man as man but only with a clash of social interests, that justice is the maintenance of the smooth working of society towards a goal unspecified or, apparently, towards any goal, that claims of ultimate right and wrong belong, not to the sphere of the rational, but to that of the emotional, it is difficult to distinguish such a view from that of Marxism which likewise denies the transcendent,

[9] *Ib.*, p. 681.

and which sometimes substitutes the metaphor of the surgeon for that of the engineer.

But if to some extent this criticism will lie against Stone, it applies in somewhat less degree to Pound who is quoted as writing,[10] "A theory that leaves out of account the quest of jurists and of judges for an ideal of absolute, eternal justice, well or ill-conceived, to which they seek to make the rules enforced in tribunals approximate as far as possible . . . ignores the chief influences in determining the bulk of the rules actually in force in any legal system at any given time". Jurisprudence, in effect, is neither to be identified with ethics nor sundered from it.

The sociological school of jurisprudence, then, is distinguished from others by its conception of law as "social engineering". The marginal comment may be permitted that this doctrine is perilous if in the thought of the *epigoni* it be taken as by and in itself an adequate account of the task and calling of the Law. Thus with the phrase "social engineering" we may anxiously compare a note by J. L. Parker.[11] "Some Soviet jurists", he observes, "have recognized that complete Socialism logically means the extinction of 'law' and the substitution of technical rules for the achievement of a planned end, which do not confer any 'rights' on anyone."[11a] Similarly Professor Pashukanis maintained that the phrase "Socialist law" is *contradictio in adjecto*, but, perhaps not surprisingly, Professor Pashukanis died in the Russian purges of 1937–1938. It would, however, be wholly improper to say that Socialism is ultimately incompatible with the reign of law. The sociologial theory is dangerous only when the transcendent is eliminated or passed over in silence. In the theory itself there is no necessity for this repudiation of traditional norms.

IV

Friedrich Karl von Savigny was born in 1779 and died in 1861. The influence of his genius has been many-sided: he may here be conveniently taken last of the great teachers of recent times, because he is of all, for our present purposes, the most important.

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[10] *Modern Theories of Law*, p. 95.

[11] In the 9th ed. of Salmond's *Jurisprudence*, p. 37.

[11a] He refers to Dobrin on "Soviet Jurisprudence and Socialism", in 52 L.Q.R. 402.

Ultimately the crucial issue for jurisprudence, as the theologian sees it, is the tension between the Natural Law doctrine of the classical and medieval tradition on the one side and on the other the Historical School of which Savigny is the acknowledged father, though not the primary or sole begetter.

He based his view upon fact, not upon any *a priori* theory. His doctrine offers "a final negation of the unitary sovereign conceived as the sole and inevitable source of law".[12] Jeremy Bentham was of opinion that for any society a legal system could well be constructed by abstract reasoning and be profitably imposed. He himself was not averse from making suggestions which he deemed appropriate. Savigny saw that in any land the legal system is, and must be, a matter rather of growth than of imposition. The decisive event in German juristic history was the "Reception" of Roman law in the XVIth century. Savigny's work lay largely in the field of Roman law; yet by a paradox not easily explained he is also sponsor for the view that the legal system of a country is the spontaneous emanation of the national life, a product of the *Volksgeist* or spirit of the people. It is "instinct coming to the surface in practical relationships".[13] Law grows with the life of the people; its development is inevitable, natural and peculiar to the people of whose life it is the expression. With this natural growth one should not interfere either by codification or radical change. The law of a people is, and must be, what it is.

Savigny's contention that the law of a country is both a part and a product of social heredity has been widely accepted as fruitful. But such institutions as slavery or feudalism are notably incompatible with his view that the legal system of a country is the inevitable outcome of a national conviction of right or of necessity; there would in such cases be more to commend the opinion of Karl Marx that the law at any period reflects the economic advantage of the dominant class. In fact, Savigny's *Volksgeist* theory of law, taken by itself, may lead to the direst consequences, but his historical conception of law is of profound and permanent significance.

The *Volksgeist* theory fits in well with the rise of nationalism and is the juristic and nationalistic expression of the Romantic

[12] C. K. Allen, *Law in the Making*, 2nd ed., p. 19.
[13] C. K. Allen, *op. cit.*, p. 46.

spirit. The issue of Savigny's thought on this matter, isolated from his other insights, is written plain for all to see. It was presumably with Hitler's Germany in mind that Dr. Allen wrote of Savigny's theory [14] that " even when the interpreter has to exercise his individual judgment in the disputes which are certain to arise as to the meaning of law, he does so as ' the representative of the people '. He too must come within the ambit of the *Volksgeist*, and he is a just and useful judge only in so far as he adheres to its dictates in forming his conclusions ". All administration of justice, said Treitschke [15] " is a political activity: the judge must form his judgment from the spirit and from the history of a particular people. An abstract justice of pedants, which floats in the clouds and has no firm ground under its feet, has in practice no justification ". Such was the accepted and practised doctrine of National Socialism. Thus on June 28, 1935, a law was passed in Germany, which, as a Nazi source expressly indicates, " sets the judge free from his earlier and strict bondage to the letter of the law and gives him liberty to punish, even where the text of the law does not imply the pronouncement of a penalty, should the sentiment of the people, in accordance with the fundamental idea of a penal law, exact a penalty. This is a recognition of the source of all right as residing in the conscience of the people; this is the basis of a new conception of the meaning of just and unjust ".[16] In 1936 Dr. Kramer, a high official in the curiously named " League for the Protection of Justice ", said, " the blood-community of the race . . . *i.e.*, the nation, is the pivotal point of all earthly existence. The nation alone is a purpose in itself. Everything else is a means to an end and must serve the good of the nation, everything including justice and law. Justice is whatever is of benefit to the nation, whatever corresponds with the German feeling of justice, the unadulterated voice of God in the race-pure soul ".[17] " It is no easy thing ", writes Dr. Norman Baynes,[18] " for an Englishman to state the National Socialist theory of law, for its basis is fundamentally mystical: law rises like a well-spring from the consciousness of the German people, from the people's

[14] *Law in the Making*, 4th ed., pp. 83 f.
[15] Quoted N. H. Baynes, *Hitler's Speeches*, I, p. 517.
[16] Cesare Santoro, *Quatre Années d'Allemagne d'Hitler*, p. 308.
[17] *West-deutscher Beobachter*, May 17, 1936.
[18] *Op. cit.*, p. 513.

soul, or from the conscience of the community of the people (the *Volksgemeinschaft*). . . . At the heart of any true system of German law there stands, not the individual, but the totality (*Gesamtheit*) of the people. . . . The law wells up from the popular consciousness, but the incarnation of the people's spirit is the Führer." We may readily admit that there is such a thing as the " spirit of a people ", the *Volksgeist*, and that there is an intimate connection between this " spirit " and the legal system of a country; yet if the legal system be deemed simply the transcript of the " spirit ", and there be no recognition of an eternal law by which all nations and all ages are bound, law is inevitably identified with the will of the dominant party and becomes the instrument of tyranny, the denial of law itself.

The enduring importance of Savigny's speculations lies elsewhere. The classical-Christian philosophy of law may be called static or non-historical in so far as it was deemed to be the attempt logically to work out that which was involved in the application to current affairs of an unchanging system of principles made known to reason. In contrast, Savigny's view may be called dynamic or historical because he laid all the stress upon the evolutionary nature of any legal system; every such system is the product, not of abstract thought, but of historical considerations. Law must be studied historically. There can be no going back upon this principle, but how shall it be maintained in such a form as not to lead to the denial of law as in National Socialism or to that ethical relativism which must destroy any possible civilization? That is the ultimate issue.

CHAPTER VIII

Natural Law and the Historical School

The thesis of this chapter is that the classical concept of Natural Law may be interpreted in a form fully compatible with the historical approach to the study of jurisprudence. A convenient starting-point will be a quotation from Harold Laski which, in view of its source, may be deemed surprising. He says, " the sooner we seek to revive the effort of the medieval schoolmen, and the great Spanish thinkers of the sixteenth century, the more rapidly shall we arrive at an adequate theory of the State ".[1] By its side we may set Sir Ernest Barker's *dictum* concerning natural law that " we must somehow incorporate that undying spirit in our modern conception of Historical Law ".[2] The more common view of recent lawyers, however, is expressed by Sir Frederick Pollock [3]: " our English school holds that the absolute law which is, or should be, the origin and pattern of all existing laws—*Naturrecht*, as the Germans call it—either does not exist or does not concern the lawyer more than anyone else ".

I

The *lex æterna*, said Alexander of Hales, is the seal; the *lex naturalis* is its impression upon man's rational nature. Positive law as an expression of reason and conscience would then be the impress of an impress. This is far too simple. Though there be fundamental principles of morality which are immutable, we may agree with Paton [4] that " the search for rules of law that are unchangeable and universal is a futile one ". The law of nature has been invoked in the support of all manner of incompatible causes. To Hobbes, and, it would seem, surprisingly to Spinoza,[5] the law of nature, as concerns man, is the law of every man against his neighbour. Locke, on the other

[1] *Modern Theories of Law*, p. 66.
[2] *Natural Law and the Theory of Society*, Gierke-Barker, vol. i, Introduction p. 50.
[3] *Essays in Jurisprudence and Ethics*, p. 19.
[4] *Jurisprudence*, p. 87.
[5] *Tract. theol.-pol.*, XVI.

hand, employed the concept to vindicate the natural rights of man against the tyrant. Natural law is a notion that has been used to buttress a monarchy or sanctify a democracy. An ecclesiastical doctrine in the Middle Ages, becoming secularized in the course of time, it inspired Rousseau, the French Convention of 1789, and the American Declaration of Independence with its basis in the " laws of nature and of nature's God ". All sorts of principles dear to the heart of this man or of that have been called " laws of Nature ". A court in Georgia, for instance, solemnly declared " the right of privacy " to be part of the law of Nature.[6] It may well be argued that a notion so vague and elusive lacks all such precision as might make it useful to lawyer or to theologian today.

In spite of the wide vagaries of men's ethical judgments we are not debarred from the assertion of absolute standards. Paton [7] refers to certain " primary rules " or " the constitution of the world ". At the Nuremberg trial Mr. Justice Jackson rested his case, in part at least, upon " the basic principles of jurisprudence which are assumptions of civilization, and which long have found embodiment in the codes of all nations.[8] Some moral principles or duties are self-evident. " Every man who makes a promise ", writes Mr. Carritt,[9] " at least professes to believe that he thereby incurs some degree of obligation to keep it, and the other party to the bargain only closes with it on the like understanding; to deny this while promising would be self-contradictory ". Similarly, as he says, we know ourselves bound to avoid giving wanton pain and to alleviate undeserved pain if we can. Of these obligations we need no proof, nor could proof be offered. Thus the principle of justice, *suum cuique*, is self-evident and logically prior to the law and to the State. In the complications of modern life there is room for wide diversity of view in respect of that *suum* which should be rendered to each, but the principle cannot be questioned. Dr. Brunner would seem justified in inferring that the concept of justice ultimately presupposes a primal order.[10] It may be impossible to

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[6] *v.* J. W. Jones, *Historical Introduction to the Theory of Law*, p. 133.
[7] *Op. cit.*, p. 72.
[8] *The Speeches of the Chief Prosecutors of the Nuremberg Trial*, H.M. Stationery Office, p. 4.
[9] *Ethical and Political Thinking*, pp. 3 f.
[10] *Justice and the Social Order*, p. 24.

draw up any series of injunctions which have been incorporated in the law *semper, ubique et ab omnibus*, but, in general, theft, adultery and murder are everywhere forbidden because they are universally seen to be injustices. The view that they are only injustices because they are forbidden by law will seem incredible to any man of sensibility. The vast varieties and contradictions in men's ethical and æsthetic judgments does not necessarily involve that there are no true and permanent principles in ethics or æsthetics. So here, if we reject the naïf idea that the law of nature, the transcript of conscience, can be readily and finally expounded in some series of propositions, we may not safely conclude that no reality attaches to the phrase "the natural law".

The question whether law is primarily and ultimately a dictate of man's will or a deliverance of his reason is raised in Year Book 18–19 of the reign of Edward III. When the question arises, What is law? Justice Hillary says, "it is the will of the Justices". Chief Justice Stonore replies, "No, law is resoun, that which is right".[11] That law is fundamentally a matter of right and of justice is obscured from us by the immense elaboration of mercantile law or administrative law which has no immediate connection with right or wrong but is concerned with convenience and the smooth running of industrial and social life. A familiar bye-law of British railways treats of the optative use of the communication cord, to the unnecessary pulling of which a penalty of five pounds is annexed. Any man is at liberty to pull the cord on an occasion deemed improper by the railways if he judges, as well he may, that the satisfaction will be worth five pounds. No question of right or wrong emerges. It is not to be maintained that with law of this very prevalent kind ethics or theology has much to do. But in respect of the Common Law, the Law of Torts, the Law of Contracts, where ethical questions are involved, it may be agreed that law is, or should be, an expression of right, not of mere will. Bracton expresses it thus[12]: "But the king himself ought not to be subject to man, but subject to God and to the law, for the law makes the king. Let the king, then, attribute to the law what the law attributes to him, namely, dominion and power, for there is no king where the will and not

[11] *v.* R. O'Sullivan, *Christian Philosophy and the Common Law*, p. 15
[12] Quoted C. K. Allen, *Law in the Making*, p. 11.

the law has dominion ". Dr. Allen comments, " this law to which dominion is due is law founded, not upon arbitrary command, but upon that fundamental Reason which must govern corporate as well as individual conduct ". Take the opposite view, and law becomes the instrument of tyranny and ceases to be what we mean by law.

Veritas facit legem, not *auctoritas facit legem*; yet undoubtedly law is in some sense an expression of will or *auctoritas*, whether it be that of the legislator or that of custom. But law is not necessarily an expression of power. Much of International Law is without sanctions, and in Anglo-Saxon law many of the king's dooms were supported only by an exhortation to keep the law and obey. We might therefore question the word " essential " in Sir John Fischer Williams' observation that " the essential difference between a legal and a moral rule is that the legal rule is conceived as enforceable by the action of the community, while the moral rule is left to the judgment of the individual ".[13] But whether or not a law can in practice be enforced, it represents, in Dr. Rommen's phrase, a " positive concretion " of will on the part of the law-giver, but is in respect of its content an expression of reason and of justice.[13a] Law is based on the needs and nature of man as a rational and moral being. The reasons for obedience to law, says Sir John Fischer Williams,[14] are moral. Ultimately, we may say, they are religious.

II

The belief in natural law rests upon the presumption that we live in a universe, an ordered system, and that of this order we as rational beings have some inkling. This is a view universally held amongst civilized peoples. Thus the Hebrew word " torah ", usually translated " law ", has in fact a far wider meaning. It is applied to the first five Books of the Bible, which contain the story of Creation, the legends of the patriarchs and the traditions of Moses as well as that which we call legislation. The word " torah ", wrote Estlin Carpenter,[15] " summed up the ancient

[13] *Aspects of International Law*, p. 7.
[13a] H. Rommen, *die Ewige Wiederkehr des Naturrechts*, p. 201.
[14] *Aspects of International Law*, p. 13.
[15] *Apud* Peake's *Commentary*, p. 121.

faith of Israel in the Divine purpose of the creation of the world, the making of man, and the preparation of the chosen people to be the organs of truth and righteousness for the nations of the earth". What we call "law", therefore, is but a part of the "torah"; it takes its place in the divine order of the universe.

We may profitably compare the conception of *rta* in Sanskrit. It is the root from which, very significantly, we derive both "right" and "rite". *Rta*, says Dr. Lehmann,[16] is "the supreme order of existence" and an irresistible power. It is, says Dr. Konow,[17] the *Urpotenz* or primal Power; it is likewise "the eternal law of the world" (*das ewige Weltgesetz*); it points to a "dim sense of an all-embracing world-connection" (*Weltzusammenhang*) or universe; it is both Right and Truth. "With the Vedic Indians", he says, "*rta* is the Truth, namely, that which is real, an eternal Law which determines the life of the Universe, and to which the heavenly bodies and the seasons no less than men are subject. So far as we can tell, the order of Right (*Rechtsordnung*) dominant in the old Aryan State, wherein the king protects Right and cannot himself break without punishment the obligations into which he has entered, co-operated in the development of the conception. It became a conception of cosmic Right (*ein kosmischer Rechtsbegriff*), while at the same time it denotes a Power-fluid, an eternal Potency." Here, then, as far back as the Vedic period we have a conception of an universal Order which is Truth or Reality and Power and Right and Law. It corresponds with Cicero's later virtual identification of *natura* and *ratio* and *jus* and *lex*.

To the layman in philology it seems strange that *rta* and *asha* should be the same word in different forms, but the learned assure us that both forms come from an original *arta*, a word which, says von Schroeder,[18] "plainly stood for the conception of the sacred and inviolable Order in Nature and in the life of man". In the Avesta, the early literature of the Iranian branch of the peoples of Aryan speech, *asha* represents that sacred Order which

[16] "Erscheinungs und Ideen-welt der Religion" in Bertholet and Lehmann *Lehrbuch der Religionsgeschichte*, I, p. 80.
[17] "Die Inder", *ib.*, II, pp. 19, 27, 34, 62, 73.
[18] *Arische Religion*, I, p. 349.

is the creation of Ahura Mazda, the Wise Lord, and is the expression of his righteous and holy will. This notion, therefore, of an order of the universe, which is reason and law and nature and justice, may be traced back to our earliest forefathers before they emerge over the horizon of history.

We may compare the notion of *Tao* or the Way in China. Thus Lao tse says, "man depends on the earth; the earth is dependent on the heavens; the heavens are dependent on *tao*, and *tao* is dependent on itself"; Nature is an expression (*Ausfluss*) of *tao*, which is the absolute Good; *tao-te* is the Law of the World and its Working; thus are Law and Ethics intimately connected with, and a part of, the whole world-order.[19] "From the earliest times known to us", wrote Archbishop Söderblom,[20] "the Way is the fundamental conception of the Chinese religion and moral teaching and of Chinese thought. It indicates the order of Nature which governs all things and in accordance with which man's conduct, virtue (*teh*), must be ordered."

In European thought the corresponding term is *physis* in Greek and *natura* in Latin, both terms pointing to a process. Nature is a whole, a moving and developing system. It is a system of law. Everything within it has its own particular law, which is the immanent urge of that thing towards its proper end. There is a natural law for plants and animals and men. The achievement of true humanity and the development of societies with their legal systems, which involve the ethical life, belong to the nature of man. No doubt, as the theologians say, and our experience corroborates, there is a taint in human nature; we do not grow into ethical beings as naturally and easily as the bud expands into a flower; we have need of constraint, and such constraint is part of the function of law. Yet all vice is unnatural in the sense that it is contrary to our true or real nature; the wicked man falls short of that which our nature was meant to be. The development of social life, tribe, State, world federation, like the attainment of character and moral development, is part of nature. Jurisprudence takes its place in the general order. The *lex naturæ*, of which theologians and moralists and lawyers speak, is but one of the laws of nature.

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[19] *v.* O. Franke, "Die Chinesen" in Bertholet and Lehmann, *Lehrbuch*. I. pp. 203 f.

[20] Tiele-Söderblom's *Kompendium der Religionsgeschichte*, 5th ed., pp. 510 f.

III

Some conception of natural law is necessary to the philosophy of jurisprudence, for natural law is correlative to the idea of a permanent standard of values. If there be no such standard, we have no measuring rod whereby codes and systems can be compared in value, and we find ourselves in the slough of sheer relativism which, however tolerable it be to certain modern minds, is the repudiation of the possibility of philosophy and may be deemed a method of escape from the facing of ultimate issues. Some conception of natural law seems to be practically as well as theoretically necessary. Yelverton under Edward IV says that in the absence of authority the judges should have resort to " the Law of Nature, which is the ground of all laws ".[21] The great legal codifications that took place at the beginning of the nineteenth century almost without exception incorporated the traditional fundamental principles of natural law. In British India the courts were directed to apply " the principles of justice, equity and good conscience " where no positive law or usage could be applied. A British Order in Council for Southern Rhodesia dated October 20, 1898, directs that the courts be guided in civil cases between natives " by native law, so far as that law is not repugnant to natural justice or morality or to any order made by her Majesty in Council ". Every revolutionary movement, every oppressed suppliant appeals to the " unwritten law " of justice eternal in the heavens. *Alle Menschen sind geborene Naturrechtsjuristen*[22] said Bergbohm.[23] The term " natural law " is avoided by modern theorists, in some cases, no doubt, because they repudiate the philosophical and theological implications of the words, but in other cases because the classical and medieval exposition of the phrase can no longer be defended. But like Nature herself natural law " expelled with a pitchfork yet comes back always ". Thus a recent writer observes that " positive law refers to and incorporates, in various forms, legal rules which, but for the fear of flouting suspiciously general disapproval, we might find it quite convenient to call by the name of natural law ".[24]

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[21] *v.* Bryce, *Studies in History and Jurisprudence*, II, p. 165.
[22] All men are born lawyers of natural right.
[23] Quoted Rommen, *op. cit.*, p. 274.
[24] *Modern Theories of Law*, p. 132.

But the difficulties in the way of a modern restatement of the doctrine of natural law are very great. In *Summi Pontificatus* the present Pope speaks of natural law as " the one universal standard of morality ". It rests, he says, upon the notion of God as Creator, Father, Law-giver, Rewarder. It corresponds to " the voice of nature which instructs the uninstructed and even those to whom civilization has never penetrated, over the difference between right and wrong ". This is the traditional doctrine unmodified; it asserts absolute standards, but what content may we ascribe to this law of nature? The issue is seen clearly in the question of slavery or the differential treatment of races. " In an English court an argument against the recognition of the rights of a slave-owner was successfully founded on the law of nature ".[25] But many, from Aristotle to those who lay stress upon the Scriptural treatment of Ham, the second son of Noah, have seen in slavery and racial discrimination a law of nature. When slavery and serfdom were accepted facts and thus appeared to belong to the natural order, there were two ways of escape for those whose consciences were troubled. Slavery could be ascribed to *jus gentium*, which must be distinguished from *jus naturale*, or it might be maintained that natural law had two forms, one of which might be called prelapsarian and the other postlapsarian; in the beginning, before the fall of man, according to this view, no man had dominion by right over any other, but in man's fallen state dominion of one over another is a natural law. Thus St. Thomas indicates that slavery absolutely considered is contrary to natural reason, but it becomes reasonable *secundum aliquam utilitatem consequentem*.[26] But what, it may be asked, is the use of this concept of natural law if its content is so vague that to this day men may disagree as to whether or no racial discrimination is forbidden by it?

It might even be said that there is less ethical agreement in the world today than there has ever been. This is acutely felt by Dr. Vidler and Mr. Whitehouse whose treatise on *Natural Law* gathers up the findings of a distinguished and varied group of Christians, lay and clerical, from the Roman Catholic to the

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[25] W. M. Geldart on *Unity and Diversity in Law*; *apud* Marvin, *Unity of Western Civilization*, p. 127.

[26] S. T. IIa, IIae, q. 57, art. 3. *Vide* also Gierke-Barker, *op. cit.*, I, p. xxxvii.

Lutheran. The authors point out that recent " ideologies " have distorted and perverted traditional ideas of justice and have thus claimed justice for their differential treatment of nations and races and classes. " It is no longer possible ", they say,[27] " as it used to be, to derive the conception of justice from human reason and morality alone, for today there are no universally accepted standards which give us an unequivocal answer to the question of what is reasonable or good or evil ". The authors conclude that " this subordination of the conception of justice to new political creeds can be effectively denounced only if we base justice ultimately on the revealed Law of God ". This contention seems to rest upon the traditional but unsatisfactory distinction between truths of reason and truths of revelation. It is to reason as well as to conscience that the law of God must be " revealed ". With moral Nihilism as with utter, wilful, inspissated scepticism there is indeed no arguing; but the consensus of mankind would adjudge a man with no reverences and no sense of absolute obligation to be defective as a human being. Multifarious are man's ideas of God and goodness, but if a man were found with no sense of the sacred and no sense of duty, he would need a physician more than a philosopher to treat him. The first principles of Reason are not brought into hazard because they are not obvious to every man at every stage of his development. If we admit that it is completely impossible to work out any casuistry of natural law, yet the concepts of natural justice and of natural law are in general to mankind at large both intelligible and compelling.

IV

It is the fundamental and unanswerable principle of the Historical School of jurisprudence that a nation's law develops in the same sort of way as its language. A legal system is not derived by logic from transcendental principles; it grows with the people whose system it is. This school of thought was at first in reaction against the concept of Natural Law for three reasons. First, natural law, at least as expounded by some, was abstract, *a priori*, rationalistic; it was assumed to be deducible by argument from first principles of reason. To this

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[27] P. 32.

the Historical School replied that law is not deduced from any abstract principles; it grows. Second, claims to universality and universal identity were made on behalf of natural law, whereas the interest of the Historical School lay in the differences in legal systems which arise from the diverse histories of the various peoples. Third, natural law was often presented in individualistic terms. If natural law be God's law written on the hearts of men, it is necessarily written upon the hearts of individual men and provokes them to private excellences, whereas the legal system of a country is a matter, not of personal ethics, but of social and communal development. The Historical School did well to look askance at natural law presented in such terms.

Has a legal system its basis in the ethical and permanent or in the historical and variant or, perhaps, in both? The historical method which is applicable to law must be applied also in the field of ethics. We cannot set down a series of ethical precepts recognized as valid since time began, nor can we maintain that "justice" has had a constant connotation in human history. But such a consideration does not involve a pure relativism as if there there were no fundamental and immutable principles in ethics. Absolute principles are not incompatible with changing applications or interpretations. It is not disputed that *suum cuique* is the fundamental and unchanging principle of justice, but the proper application of this principle to any particular situation may be matter of endless disagreement to the point of civil wars. Hence there can be histories of ethics parallel to histories of jurisprudence.

Dr. Rommen has pointed out that from the beginning there have been two distinct conceptions of natural law. The first of these he calls revolutionary and individualistic; it presupposes that membership of organized society and the State is a matter of choice and free contract. Those who take this view tend to regard natural law as the defence of the autonomous individual against Leviathan. As sponsors of this attitude Dr. Rommen cites the earlier Sophists, Rousseau and even Kant. The second conception, to which Plato and Aristotle adhere, is that of a metaphysically based law of nature which has no mythical existence prior to society but realizes itself in society. This is the

conservative conception.[28] The Historical School of jurisprudence rightly repudiates natural law in the first of these two senses. The picture of primitive or original man having some private individual life prior to society and then voluntarily coalescing with others to form society is phantasy, not history. No doubt the fully organized State appears late in history, but man is from the first a social and a socially conditioned creature; such he was before he became in any recognizable sense an independent person. Pictures of early man, as drawn by Hobbes or Rousseau, have no basis in reality. If man has rights against society, such rights must rest upon what human nature is, not upon what primitive man was or may be supposed to have been.

But the second doctrine of natural law may itself be called historical or evolutionary. Sir Ernest Barker has pointed out that in Aristotle the term " natural " as applied to law has three distinct, but allied, meanings. It may indicate that which is " immanent in the primordial constitution of man ", as the oak-tree is immanent in the acorn. Second, " natural " as applied to law may indicate man's nature as it has in fact developed. In this sense we might say that war is natural to man. By this we should not imply that Neanderthal man or any other such early ancestors were naturally addicted to war; they may have been too few or too scattered or too preoccupied for such pursuits; nor should we imply that, if human nature should develop all its potentialities, men in nations or tribes or empires would still be bound to engage in war. War is natural to man as selfishness is natural; but we may hold that when man attains to the full stature of his nature he will no longer engage in war or behave with selfishness. Third, " natural " as applied to law may point to that which is inherent in man's final development. Thus for Aristotle *koinos nomos,* the common law of mankind, only becomes actual as men become rational.[29] Natural law, said Bryce in his classical exposition,[30] is an attainment of Reason; it is natural " not so much in the sense of belonging to men in their primitive and uncultured condition, but rather as corresponding to and regulating their fullest and most perfect social development in communities, where they have ripened through

[28] H. Rommen, *op. cit.*, pp. 13, 46, 98, 115.
[29] Gierke-Barker, *op. cit.*, I, pp. xxxv f.
[30] *Studies in History and Jurisprudence*, II, p. 152.

the teaching of Reason "; this is " broadly speaking the view of the classical jurists ".

Natural law is not defensible as a casuistical system of ethical propositions applicable in every age and always available to the minds of men. " The contents of the law of nature vary with the ages ", said Vinogradoff [31], " but their aim is constant, it is justice." What appears right at any time must be relative to the age and culture of a people; deeper insight will grow with increasing rationality, with experience, with experiment. The standard is absolute; the application must be relative; but there is no contrariety in principle between the absolute standard of the natural law and the historical interpretation of human law. Thus Bryce says of natural law [32] that " seen from the point of view of theology or metaphysics, this universal or Natural law is prescribed by God or by Nature. Seen from that of history and political science, it issues from the will of mankind, who, organized as nations, have created it by custom and practice. Seen from the side of ethics and psychology, it represents the tendencies and habits of the typical good man, who desires to treat his neighbour as he would wish to be himself treated ".

The classical doctrine of natural law needs, then, no very radical restatement to bring it into line with the insights brought by the modern historical approach. " The Order of this world is the *lex æterna* ", writes Dr. Rommen [33]; this is a universe, an order, wherein each part or element has its own place and nature. Every living thing has an immanent urge to realize its nature, the seed to grow into a tree, the chrysalis to become a butterfly, the child to become a man. In the case of plants and animals this urge is unconscious or instinctive as it is in some degree with man; but he as a self-conscious, rational creature has a new kind of freedom. He must achieve the ends of his nature by deliberation, by effort, by experiment, by choice. He is by nature and from the first a social being knowing that he owes just dealing to his neighbour. What is involved in this principle of *suum cuique* he apprehends at first but dimly; even when he attains relative clarity, new difficulties arise with more complicated circumstance and with increasing insight and

[31] *Commonsense in Law*, pp. 176 f.
[32] *Op. cit.*, p. 143.
[33] *Op. cit.*, p. 184.

cultural advance; but still the same instinct drives him, the same ideal calls him, the same principle must find expression in his laws; for, as Aristotle saw, " nature " is at once a potentiality, an actuality and an end. Were there no absolute standard which we apprehend dimly or in part, we should have no principle by which to judge legal systems or on which to base our legislation; we should " fluctuate without term or scope " on the engulfing sea of relativity.

Justice as an absolute standard may conveniently be called a law, for, first, the requirement of justice in human society is as much a law as that law whereby the birds build their nests and feed their young. If for any reasons birds do not or cannot build their nests and feed their young, the species perishes; if men do not strive to keep the law of justice amongst themselves in their societies, there is neither peace nor happiness but ultimate destruction; the requirement of justice is a law that cannot be violated with impunity. Second, the requirement of justice may be called law because it comes to us, not as an expression of our wishes or of our inclinations, but with a sense of obligation; it is law, not choice. Third, we live in a rational universe which is a realm of ends which therefore are the immanent laws of Nature and of Nature's Author and Original. If we would see jurisprudence in its setting as part of nature and consider the ultimate moral and metaphysical questions to which the study of jurisprudence gives rise, we must come to some conception of an eternal, immutable law of justice eternal in the heavens, written on the heart of man, the goal, as it is the glory, of our law.

CHAPTER IX

Natural Rights and Legal Rights

Akin to questions of Natural Law is the assertion of " natural rights ". In distinction from legal rights which are created by the law there are, it is claimed, certain natural rights which are prior to the law and which must be defended by the law. " A legal right ", said O. W. Holmes,[1] " is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution or compensation by the aid of the public force ". Claims based upon rights so defined, as he says, may be founded upon righteousness or upon iniquity. Man cannot have a natural right to do what is unjust, but he may often have a legal right. With rights, liberties, privileges and powers of this kind the theologian as such has no concern. The theological or philosophical issue as it concerns jurisprudence can be very simply stated. It never occurred to the peoples of antiquity that the individual citizen could have rights against society or that man as man has inherent and inalienable rights. It was the advent of the Christian religion which brought with it the sense of the infinite value of the human soul, because man is made in the image of God and called to be a child of God. The Greeks recognized the everlasting law of righteousness or justice which was older than the gods; but man they regarded as essentially a social being, for whom justice meant that he had his due place in society and fulfilled the duties of his office; against society he had no prior rights. For Aristotle, man as man had no rights, for the slave had none; man had his rights as a citizen, that is, as a member of society, but never against society. Even a fugitive glance at medieval doctrine, says Gierke,[2] suffices to shew how " in sharp contrast to the theories of Antiquity runs the thought of the absolute and imperishable value of the individual ". This, he adds, is " a thought revealed by Christianity ". In other words, that valuation of the individual which runs through medieval thought, which was the

[1] *Common Law*, p. 214.
[2] *Political Theories of the Middle Age*, Gierke-Maitland, pp. 81 f.

ultimate inspiration of Rousseau and Tom Paine, and which gives rise to the claim of rights to life, liberty and the pursuit of happiness, comes from the Bible. Legislators such as Hitler or Stalin, who consciously repudiate the Bible, recognize no rights in the individual, and their systems seem to us the denial of law. But is it the case that the reign of law, the *Rechtsstaat*, rests upon the implicit acceptance of the Christian valuation of man, and does this mean that man has rights against society?

Many and various have been the alleged natural rights of man. Most famous have been the rights to "life, liberty and the pursuit of happiness". The right to the pursuit of happiness is ill-conceived, for it is not given to governments or neighbours to prevent us from trying to be happy. Whether we have a right to *be* happy is an altogether different matter, an ethical and religious issue of another colour. If we had an unqualified right to life, military discipline in wartime would not easily be maintained; if we had an unconditional right to liberty, our prison population would be very much reduced. We may translate these alleged rights of nature into more manageable form by saying, if we will, that every man naturally has the right to life, to liberty and to the pursuit of the things that he thinks will make him happy, unless situations arise where these rights must be overruled by other considerations, which will prove to be social considerations. These, then, are not natural rights against society.

It is claimed that man has a natural right to private property and to testamentary disposition of it. Property corresponds with ownership and possession, but these latter are conditions constituted and defined by law. Property cannot well be defined except in terms of rights created and recognized by law, and it is not profitable to lay down the formal principle that we have natural rights to such legal rights as the contemporary juridical system may afford us. As against Communism it is constantly insisted, especially by Roman Catholic champions of natural rights, that private property is essential to man as a necessary extension and expression of human personality; and it may be agreed that if a man have no money of his own, so that he can buy no books, have no choice in what he wears or eats, and cannot furnish his room, he is reduced to the status of a homeless slave; for a home, however poor, is an expression of the freedom,

the character, the personality of those who dwell in it. This is the proper basis for the claim of a natural right to private property; but this is not denied by Communists, for they have not abolished wages. If the State consist of families and persons, we cannot abolish altogether the distinction between *meum*, *tuum* and *nostrum*, and no Socialist order deprives man of all right to appropriate some things to himself.

A natural right of this kind, then, is without significance and content till it be defined and limited by positive law. For instance, that loans should be repaid may be said to be part of natural law; from this principle may be derived the right of the lender to be repaid. But that right is abstract and meaningless until positive law shall have specified the time within which loans must be repaid, six months or six years or sixty years. The natural right is inoperative without the legal. So the natural right to private property remains abstract and meaningless, till the State have defined the scope and terms of the rights of property.

It has been supposed that a man has a natural right to leave his property to whomsoever he will by his last will and testament. This must be regarded as an illustration of what Julius Stone calls the "Anglo-natural rights of man".[3] A will is a legal document drawn up subject to conditions laid down by law. Death duties are an obvious limitation upon the freedom of testamentary disposition, nor was such freedom ever more than a legal right. The natural lawyers seem to have supposed that the origin of property lay in the division of those goods which were *res nullius*; that is, I find something that belongs to nobody and take possession of it; it thus becomes mine, and I can give or bequeath it to whom I will. The idea of property as an extension of a man's personality came later. It was, says Stone,[4] "a return to reality" when Savigny and his school held that property "was founded on adverse possession ripened by prescription; ownership was thus traced back to the crude fact of physical control gradually developing first into a *right* to control or possession, and then to a property right independent of the fact of possession, such property rights being first collectively vested in village or family groups, individual property rights only later emerging".

[3] *The Province and Function of Law*, p. 247.
[4] *Ib.*, p. 529.

As a statement of sociological tendencies, says Stone,[5] there is no absurdity in Duguit's assertion that the facts of social life spontaneously produce law and justice out of themselves. Here then again is the familiar tension between the natural-law school and the historical. The sponsors of natural law may argue with complete justification that the possession of some amount of private property held by an individual or a corporation is a necessary element in the good life and the fulfilment of the capacities of human nature. There is therefore in this sense a "natural right" to private property. The historical lawyers may with equal justification reply that private property is an institution that has very gradually developed, that the development has been quite uninfluenced by abstract notions of the good life or of the capacities of human nature, and that in every case it is the law, not any abstract theory, which defines and limits private property. The one view does not contradict the other. If, as the natural lawyers may say, private property is necessary to the good life and the fulfilment of human nature, then we should expect the tendency of historical development to be in this direction, as the historians say it was. Historical and teleological jurisprudence are not mutually incompatible.

Freedom of conscience and freedom of speech are constantly alleged to be natural rights as if they were prior to society and superior to its claims. But this cannot be so. As we cannot permit lunatics to follow any pursuit whatever, provided it seem rational to them, so we cannot reasonably permit every kind of speech or conduct provided it claim the inspiration of conscience. We must require the Doukhobors to dress before they go abroad, and seditious speech must be a punishable offence. Freedom of conscience and freedom of speech are not rights contrary to, or without reference to, the public good; they are privileges that must be granted by society to its members, if that society would be free, healthy and humane. It may be noted that the Roman Catholic Church does not believe in, or willingly allow, freedom of speech or conscience as these freedoms are democratically understood. They are rejected because, as it is asserted by Roman Catholics and by Communists, they are not to the public advantage. We may assert, if we will, that freedom of speech

[5] *Ib.*, p. 674.

and conscience are natural rights in the sense that when humanity attains its true stature or any society realizes the true ends of society, speech and conscience will be free; but we may not assert these freedoms as privileges of individuals to be maintained by law irrespective of the advantage of society.

Another natural right, frequently alleged, is to freedom of contract or freedom of association. Of contract Anson wrote,[6] "a Promise in fact connotes an Agreement between the parties to it. What then must be added to this definition before a Promise will become *legally* binding on the person making it; or in other words on what conditions will English law recognize the Agreement of the parties which contains a Promise as a Contract?" If natural rights be deemed prior to law, freedom of contract as a natural right is an absurdity. There is no point in saying that a man has a natural right to make promises; a contract, which is a promise legally binding, has no meaning apart from positive law; it therefore cannot be a natural right in any other sense than that when society attains to the realization of the true nature of society, such a society will approve freedom of contract. Natural law or natural rights in this sense may be a true directive to the legislator; they are not supernatural demands which without reference to the good of society at any stage he must incontinently obey.

Freedom of association is a more complicated matter. It means freedom to join a Trade Union, a Church, a literary society, a golf-club. Has man a "natural right" to do these things? With the advance of civilization men tend naturally to form societies and to associate voluntarily with one another for various purposes of common interest. But they cannot have an unqualified and absolute right of association irrespective of the purpose of the association, a right prior to the law and of higher authority than it. Privy conspiracy can never be an illustration of natural right! The problem is complicated by the fact that the State is the only association clearly recognized in the classical theory of Natural Law. The State, it was supposed, arises according to the will of God for the ordering of society, the restraint of the evil tendencies of men, the furtherance of human well-being. The State and the individual, therefore, were the

[6] *Principles of the English Law of Contract*, 19th ed., p. 4.

two entities with which classical, political and legal thought was exercised. Hence the combat " in which the Sovereign State and the Sovereign Individual contended over the delimitation of the provinces assigned to them by Natural Law, and in the course of that struggle all intermediate groups were first degraded into the position of the more or less arbitrarily fashioned creatures of mere Positive Law, and in the end were obliterated ".[7] Natural Law, in fact, found no place for the Corporation; hence " the Corporation could find a place in Public Law only as a part of the State and a place in Private Law only as an artificial Individual ".[8] But this is a matter that falls for discussion in a later chapter.

In these days man is often alleged to possess a natural right to participate in the government of his country, a right, as we might put it, to political maturity. We learn slowly how unkind as well as fruitless it is to attempt to impose British democratic forms upon a primitive people. It is absurd to claim that every man, no matter what the stage of culture or savagery of his society, has by nature and always the moral right to vote in elections conducted according to democratic forms or in some other way to share in the government of his tribe or nation. But there is no reason why natural rights should not be conceived to arise gradually with the advance of man from primitive conditions to higher forms of civilization. There is no absurdity in the claim that civilized man has the natural right to share in his country's government on the ground that, when man has reached a certain stage of culture, he is unable fully to realize his capacities if he is cut off from this aspect of public and social life. This is well put by Mr. Elliott Dodds [9]: " without self-government men cannot attain full personhood; at the same time self-government depends upon their acting as persons "; again, " it may indeed be said most truly that unless men are prepared to accept the responsibilities arising out of these rights, the rights will be forfeited. This is one of the natural laws of the universe ".

The most fundamental rights of man, says Fr. Watt,[10] are " the right to life, to bodily integrity, to obtain the necessary

[7] Gierke-Maitland, *Political Theories of the Middle Age*, p. 100.
[8] *Ib.*, p. 99.
[9] *The Defence of Man*, pp. 25, 34.
[10] *The Natural Rights of Man*, pp. 6 f.

means of existence, the right to tend towards man's ultimate goal in the path marked out for him by God, the right of association, and the right to possess and use property ". This seems a somewhat heterogeneous collection of " rights ", some of which have already been considered. Of the rest, the right to bodily integrity, the right to obtain the necessary means of existence and the right to tend toward a man's ultimate goal in the path marked out for him by God, none is satisfactory as it stands. Have we and all men an *a priori* and unconditional right to bodily integrity in wartime? If the State may properly insist upon vaccination, can we assert that a " natural right " is violated if, for instance, the State require the sterilisation of lunatics or other diseased persons? This is a most difficult question and certainly no case of self-evident natural right. Again, we cannot have the natural right to obtain the necessary means of existence, when, for instance, the food is insufficient to go round. *Impossibilium nulla obligatio est* is a good principle of law; there can likewise be no natural right to the impossible. Further, it may be suspected that man's alleged right to tend to the goal marked out for him by God is a question-begging formulation. If it be meant that every person has a natural and indefectible right to follow the line of conduct which he believes marked out for him by God, by what right did the British *raj* suppress *suttee* in India, or hang a chief in Basutoland for ritual murder? Fr. Watt is probably concerned with the claim of a " natural right " to be a good Roman Catholic; his Church does not believe that anyone has a " natural right " to be a Protestant or unbeliever!

The conclusion that all the alleged natural rights of man are bogus would be too easy. Man is indeed logically prior to the State, but he never was, and never is, a solitary individual, the subject of certain privileges which he may enjoy without reference to the society or fellowship of which he is a member. Mr. Carritt wisely observes,[11] " the mistake has been to speak of natural rights, which would be absolute, rather than of natural claims, which might conflict so that only the strongest would be a right; and also to call them inalienable, which would seem to make them not depend upon the situation ". He concludes that " equality of consideration is the only thing to the whole of

[11] *Ethical and Political Thinking*, pp. 155 f.

which men have a right ". The rights hitherto considered are really claims which a man may properly and reasonably make and which must be met by society subject to the claims of other men, all of which must receive equal consideration, it being understood that the good of the whole has greater claims upon an object of desire than has the good of a single individual. It would be better, therefore, to speak of " legal rights " and " natural claims ".

But this right to equality of consideration, as Mr. Carritt puts it, is not to be identified with the old doctrine of equality before the law. " The law in its majestic equality ", wrote Anatole France,[12] " forbids the rich as well as the poor to sleep under the bridge, to beg in the streets, and to steal bread." The claims put forward under the unsatisfactory form of " natural rights ", must be met so far as possible in a civilized society. The law exists for the maintenance of freedom and of justice, for the protection of the individual from the fraud or force of the powerful. But we should consider the assumptions and presuppositions underlying this conviction. These claims, so fundamental that they are often set forth as indefectible rights, rest upon a spiritual conception of human nature and human personality; they come to us, ultimately and as a matter of history, from the Bible; their logical foundation is the belief that man is, at least in potentiality, a child of God. Where this foundation is explicitly denied as in Nazi Germany or Soviet Russia, these claims fail, and law becomes the instrument of tyrants. Apart from the presupposition of Biblical theology, we cannot maintain law as in the West we know and honour it. Theology, ethics and jurisprudence cannot in the end be sundered.

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[12] Quoted Stone, *The Province and Function of Law*, p. 264.

CHAPTER X

International Law

The marginal comment to be made upon International Law by the theologian is obvious, yet so important that it cannot be passed over as too obvious to need mention.

Thomas Hobbes could say that " as for the law of nations, it is the same with the law of nature ". No doubt earlier generations overestimated the degree of ethical agreement in the world; none the less there was, as there is, something corresponding to that which Sir John Fischer Williams called " the legal conscience of the contemporary world ".[1] At the very lowest, all trade rests upon moral principles; there must be a degree of honesty and a keeping of undertakings, or commercial dealings are impossible. In the Roman courts there was a body of law built upon principles generally accepted as reasonable and fair. It was in theory close to natural law, and later gave body to the concept of *jus naturale*, but was in practice, as Sir Ernest Barker says,[2] largely a body of commercial law. " The basis on which the law of nations rests is made up of concepts taken from the civil law of Rome—however much these concepts may sometimes have been disguised in the garb of custom, reason or the law of nature." [3]

International Law, as we know it today, is a subject where even those most learned in the law do not throw a uniform and satisfactory light upon many of the fundamental questions that occur to the enquiring mind. Some find it convenient to recognize as laws only such rules as are enforced by a sovereign political authority; this definition covers our Private International Law which " comes into operation whenever the court is seised of a suit that contains a foreign element ",[4] but would not cover Public International Law which deals with the relations of States to one another. Kelsen, on the other hand, for all his polemics against Natural Law, regards International Law as the type or form of law.

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[1] *Aspects of Modern International Law*, p. 62.
[2] Gierke-Barker, *op. cit.*, pp. xxxvi f.
[3] Gutteridge, *Comparative Law*, p. 62.
[4] Cheshire, *Private International Law*, p. 3.

Since *prima facie* there is no sovereign political authority to impose or enforce Public International Law, we may ask whether the sovereign State is bound thereby. Dr. Allen, raising the question whether Parliament has power to legislate in defiance of the Law of Nations, writes [5] : " It cannot now be seriously contended that the so-called restrictive force of International Law goes further than this that ' every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law ' ". Sir John Fischer Williams would seem to go further. He writes [6]: " Obedience to international law is indeed a main part of the conditions on which a state is originally received into the family of civilized nations. It is not in the power of a state to disclaim obedience to international law and to remain a member of the great society. Thus when at one time a state passed a law which in the opinion of the United States was ' generally and substantially subversive of the principles of international law by which and not by domestic legislation the ultimate liability of governments to one another must be determined ', the American government, joining in a general diplomatic protest, took the view that the state in question ' placed herself outside the pale of international intercourse '. A member of a society must obey that society's law or forfeit its membership ".

International Law is not customary nor contractual nor imperative nor even " natural "; rather it is conventional; it is, as the first Lord Russell of Killowen said, " the aggregate of the rules to which nations have agreed to conform in their conduct towards one another ". There is no sovereign political authority to enforce the conventional rules of International Law, but upon what principles are they based? In a curious and tentative passage, G. W. Paton says,[7] " In the international sphere there is no constitution, but may there not be certain primary rules which mark out the sphere both of the laws of the States and of international law itself? Thus when the relationship between the legal systems of two States, or between the law of England and international law, becomes a matter of conflict, the primary rules (or the constitution of the world) could supply

[5] *Law in the Making*, p. 273.
[6] *Aspects of Modern International Law*, p. 16.
[7] *Jurisprudence*, p. 72.

legal material according to which the conflict would be solved ". This is obscure, but these remarkable phrases " primary rules " and " the constitution of the world " look singularly like Natural Law in a slightly different dress. We may compare Geldart's observation [8] that Private International Law or the Conflict of Laws implies " that the Courts hold that the world of law is one ". Dr. Gutteridge [9] speaks of the law of nations or Public International Law as " the principles of justice, which, by the common consent of mankind, should govern relations between States or nations ". Sir John Fischer Williams is more explicit on the relation of International Law to universal ethics. He says [10]: " A court of international law is not entitled to lay down as new law what it conceives to be morally right or what might in its view properly or conveniently be made law. Such a court is, however, bound not merely to apply existing treaties, and respect such obligations as States have in terms or by custom accepted, but also—and this function is of great importance in international matters—to interpret what may be called the general sense of civilized humanity, and to declare that to be law which after an objective consideration of all the necessary evidence it esteems that the legal conscience of the contemporary world—a conscience which is not limited to States as its organ of expression, though States are its main organ—has already, tacitly or expressly, accepted as law, binding States and men. A position of this kind is very far from the acceptance of morality by itself as having legal force, and it is equally remote, or perhaps it would be fairer to say it is more remote, from the opposite pole of opinion which limits law only to such propositions as States by express or implied contract have bound themselves to obey ". A little lower down,[11] he says, " Municipal law does not enforce agreements which violate public policy (*ordre publique*). It is conceivable that this principle is not limited to municipal law. Would a treaty to revive the slave trade be regarded as internationally valid? ' A good treaty ', said Bodin, ' should not violate either international law or natural law or the divine law ' ". This, Sir John comments, " is

[8] *Apud* Marvin, *The Unity of Western Civilization*, p. 135.
[9] *Comparative Law*, p. 61.
[10] *Aspects of Modern International Law*, pp. 61 f.
[11] *Ib.*, pp. 65 f.

perhaps a moral maxim and not a legal proposition—but the pronouncement is significant ".

International Law is conventional. It has been too easily assumed that its conventions are accepted by all peoples claiming to be civilized. In due course the so-called Nuremberg Trial will, no doubt, find its way into the legal textbooks, but attention may be drawn to it now because it reveals a situation that twenty years ago would have appeared incredible and that already is treated by sentimentalists as incredible, though the facts are not in dispute.

The International Military Tribunal which conducted the trial enjoyed a " unique and emergent character,[12] yet it was set up, not to create International Law but to administer recognized and accepted law. " At least in the international field ", said Sir Hartley Shawcross,[13] " the existence of law has never been dependent on the existence of a correlated sanction external to the law itself. . . . The first man tried for murder may have complained that no Court had tried such a case before. The methods of procedure, the specific punishments, the appropriate courts, can always be defined by subsequent proclamation. The only innovation which this Charter has introduced is to provide machinery, long overdue, to carry out existing law, and there is no substance in the complaint that the Charter is a piece of *post factum* legislation either in declaring wars of aggression to be criminal, or in assuming that the State is not immune from criminal responsibility ". But this is a matter for the lawyers; for the theologian or moralist it may suffice that those arraigned before the tribunal received by general consent a fair trial and that they had committed those offences for which they were condemned.

They were accused of war crimes and crimes against humanity. It is not easy in every case to distinguish between these two species of crime. " The principal War Crime in extent as in intensity with which these men are charged ", said Sir Hartley Shawcross,[14] " is the violation of the firmly established and least controversial of all the rules of warfare, namely, that

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[12] Mr. Justice Jackson, *The Trial of German Major War Criminals*, Stationery Office, p. 4.
[13] *Ib.*, p. 57.
[14] *Ib.*, pp. 60 f.

non-combatants must not be made the direct object of hostile operations. What a mockery the Germans sought to make of the IVth Hague Convention on the laws and customs of war—a Convention which merely formulated what was already a fundamental rule: 'Family honour and rights, the lives of persons and private property, as well as religious convictions and practices, must be respected'. The murdering on the orders of the German Government, whose members are here in the dock, in the territory occupied by its military forces, whose leaders are here in the dock, of millions of civilians, whether it was done in pursuance of a policy of racial extermination, as a result of, or in connection with, the deportation of slave labour, in consequence of the desire to do away with the intellectual and political leaders of the countries which had been occupied or was part of the general application of terror through collective reprisals upon the innocent population and upon hostages—this murdering of millions is a War Crime. It may indeed be a crime against humanity as well. . . . The truth is that murder, wholesale, planned and systematic, became part and parcel of a firmly entrenched and apparently secure belligerent occupation. That that was a War Crime no one has sought to dispute". The theologian, remembering the Frenchman's observation that the English "ne veulent jamais voir les choses, ni comme le bon Dieu les a faites ni comme le Diable les a changées", is concerned only to point out that these War Crimes were actually committed in the last few years by a people that had been deemed in the van of civilization and enlightenment.

In respect of Crimes against Humanity Sir Hartley Shawcross spoke of twelve million murders "not in battle, not in passion, but in the cold, calculated, deliberate attempt to destroy nations and races, to disintegrate the traditions, the institutions and the very existence of free and ancient States. . . . Two-thirds of the Jews in Europe exterminated, more than six million of them on the killers' own figures. Murder conducted like some mass production industry in the gas chambers and the ovens of Auschwitz, Dachau, Treblinka, Buchenwald, Mauthausen, Maidanek, and Oranienburg. And is the world to overlook the revival of slavery in Europe, slavery on a scale which involved seven million men, women and children taken from their homes, treated as

beasts, starved, beaten and murdered? " This is not extravagant rhetoric; the indisputable evidence is available for all to read. Again, this almost incredible picture is not the result of a unique and transitory instance of a civilized nation attacked by corporate paranoia. It is not only Germans who do these things. It is well to remember the fate of the Baltic States; it has been shewn that the national economy in the U.S.S.R. depends upon slave labour involving about twelve million persons; the Germans are still asking about the fate of their prisoners of war in Russia.

International Law is a system, or the outline and first beginning of a system, resting upon an ideal of the nations of the world living together as a mutually tolerant and mutually serviceable community upon the basis of freedom, respect for man as man and the fundamental principles of morality or of " natural justice " which constitute part of our classical-Christian civilization in the West. It is well to recall some of the phrases of the lawyers which have been cited above—" primary rules ", " the constitution of the world " (G. W. Paton), " the great society ", the " family of civilized nations ", a " general sense of civilized humanity ", the " legal conscience of the contemporary world " (Sir J. Fischer Williams), " the world of law is one " (W. M. Geldart), the " sanctity of man ", the " law of mankind " (Sir H. Shawcross). These who have been quoted do not introduce the name of God into their discussions; they are very chary of the phrase " the law of nature "; they do not elaborate the presuppositions of their principles; but these implicit presuppositions are not far to seek. International Law as we understand it rests broadly upon the Christian ethic and is only conceivable on that basis. It must be for the International Lawyers a question of the utmost moment whether without a rekindling of Christian faith there will be the moral enthusiasm without which the reign of law cannot be re-established between the nations, and, indeed, whether without a rekindling of the Christian faith the Christian ethic is likely for long to possess the minds of men. " The process of rebuilding must begin with the foundations. . . . Somehow or other men must be persuaded, if not of the truth of the Christian religion, at least of a Divine order, a natural law, a common standard above the human level by reference to which all human conduct can be judged. . . . In a word, the world

cannot be saved except by a common faith. At this point it will be obvious that the mere lawyer has reached the limit of what he can usefully say." [15] In no other sphere is the intimate connection between Theology, Moral Philosophy and Jurisprudence so self-evident as here.

[15] H. A. Smith, *The Crisis in the Law of Nations*, p. 102. I am grateful to Professor A. H. Campbell for this quotation.

CHAPTER XI

Corporate Personality

Theologians, philosophers and jurisconsults are from different points of view concerned with questions of alleged corporate personality. It will be convenient to start from legal terminology.

I

Individuals are not the only subjects of rights and duties. In the Roman Empire the State, as a corporate body, owned slaves and the public lands; to municipalities also rights and duties were conceded by the State; finally, there were societies such as burial clubs and charities to which the State had likewise granted rights and duties. But these corporate bodies were not called "legal personalities"; at most they could be said to perform personal functions, *personæ vice fungi*. There was no Latin word *personalitas*, and *persona* was applied to individuals only. A corporation is a body legally authorized to act as an individual. The Justinian texts refer to corporations as *universitates*. Beside the *universitas* was the *societas* or partnership, but "the *societas* lacks the most striking characteristic of a modern partnership. *Obligatio* is personal, and the contracts of a *socius*, even in business of the firm, are his, not the firm's".[1] We may say no more then in respect of Roman law than that certain corporate bodies were empowered to perform some of the functions of an individual.

Our notion of a legal, as opposed to a real, personality is represented by the medieval phrase *persona ficta*. The word "personality" in law has a different meaning from that which it enjoys in common speech. Not all human beings have full legal personality, for the personality of infants and of lunatics is restricted; and not all fellowships are "persons" before the law; thus in English law a partnership is not a legal personality but is the sum of its members. In law a *persona* or "personality" involves "the capacity of being a 'right and duty bearing

[1] W. W. Buckland, *The Main Institutions of Roman Private Law*, p. 276.

unit ' " [2]; it is a " juristic reality ", a " convenient juristic device by which the problem of organizing rights and duties is carried out ".[3] It might seem, then, that " subject " would in such cases be a less misleading term than " personality " in its legal use, and that the idea of *persona ficta* or legal personality has little to do with what is meant by " personality " in philosophy or theology.

But a legal personality has, or is deemed to have, a will, and it would seem that that which has a will must in some real sense be personal. Most people agree, says Buckland,[4] that " besides capacities in law, a real *persona* must have a will. Has a corporation a will, distinct from that of its members? What it decides may not be exactly what any one of its members wants. Is this the will of the corporation as distinct from those of its members, or should we say that the members have bound themselves to accept a decision reached in a certain way, so that it is really their will, and the corporation has none of its own? " All manner of curious questions arise in this connection. An idol or a fund may be an incorporated body and therefore a " person " before the law. Thus in the case of *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*,[5] it could be said in court that " the will of the idol in regard to location must be respected ". Again, the Crown is a corporation sole (that is, an incorporated series of successive persons as distinct from an incorporated group of co-existing persons); the Crown has a putative will, in theory one and indivisible; but how is this to be conceived when the Commonwealth of Australia sues the State of New South Wales, or the will of the Crown in the Protectorates can be so clearly distinguished from the will of the Crown in the Dominion of South Africa? But if in the field of politics a will be denied of a corporation, can it be ascribed to a church or Christian fellowship?

II

Whether any particular partnership or society or association is, or is not, technically incorporated is a matter of no moment to philosophy and theology, for incorporation is a juristic device.

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[2] Paton, *op. cit.*, p. 249.
[3] *Ib.*, pp. 271, 251.
[4] *Op. cit.*, p. 88.
[5] (1925) L.R. 52 Ind.App. 245.

But whether or in what sense personality may be ascribed to a corporate whole is a matter of great moment. We find two extreme views both in political or juristic and in theological thought.

Gierke in the field of political and juristic thought stands sponsor for what he called "*der Zentralgedanke der realen Gesammtpersönlichkeit*". According to his view a corporate body is, or can be, a real person or a real super-person. The State, in particular, is not merely an organization but is in some sense an organism also. It would seem that Gierke hovered between saying that the State is an organism and that it is like an organism, but at least he insisted that the State or a group is, or may be, a person.[6] It belongs to this type of thought to regard the State as supremely, if not solely, the form of super-personality. But it is not easy to see why a State, however internally divided, should be regarded as one person or super-person, and a school or college or Christian denomination should not be so regarded. Of German thought in this realm Sir Ernest Barker aptly remarks,[7] that "when it becomes a thought about Groups and 'super-personal realities', it becomes (at any rate to the realist) a matter of billowy cloud and rolling nebulosities . . . It is indeed a philosophy which can ennoble the individual and lift him above self-centred concern in his own immediate life. But it may also be a philosophy which engulfs his life, and absorbs his individuality; and it may end, in practice, in little more than the brute and instinctive automatism of the hive". It has been in the latter brute form that Gierke's theory has been developed by the Nazis, who, however, preferred to speak of the *Volk* rather than the State. "A people is not a sum-total, not a mechanical aggregate of individual people who are independent, but a supra-personal unity, bound in a supra-individual reality through common conditions of life, through identity of origin and destiny, language, spiritual content, values and purposes, through a common consciousness and striving. The State is vitally necessary as an organic system within the organism of the nation; in it the national will finds its form and becomes organized for action".[8] In fact, however, "State", "nation", "people"

[6] *v.* Gierke-Barker, xxix f.
[7] *Ib.*, p. xvii.
[8] Quoted from the jurist Ernst Krieck by Geraint V. Jones, *Democracy and Civilization*, p. 156.

are very fluid terms, as a glance at the British Commonwealth will indicate.

A very similar doctrine with a very different application is found in Eastern and modern Roman Catholic mystical theology whence it has been received, consciously or unconsciously, into sympathetic Anglican circles and has sometimes seeped thence even into Reformed theology. It is connected with the idea, so forcibly put by St. Paul, that the Church is " the Body of Christ ". Thus the philosopher Solovyev could speak of the Church as the " mystical Body of Christ (not metaphorically but in the sense of a metaphysical truth). It is a body partly spiritual and partly material "; it is an " organism ".[9] Similarly Serge Boulgakov [10] spoke of the Church as the Body of Christ " in the most realistic sense ". So, too, in the West it is in these days often alleged that this *corpus mysticum*, the Church, the Body of Christ, is both holy and infallible, though it be composed of those who on earth are obviously not holy and admittedly are not infallible. The prevalence of this view today may be in part an illustration of the romanticism of modern " Catholic " revivals, and in part an unconscious reaction to the rise of violent nationalisms. Soberer and wiser Roman Catholic theologians, when pressed, admit with St. Thomas that the Church is *relatio*, not *ens subsistens*.

At the other extreme stands the atomic view which needs no extended exposition. It holds that since individuals compose the nation, the school or the church, these corporate bodies are simply aggregates of individuals and nothing more. The individual is regarded as being, in theory at least, prior to, and as existing apart from, the society of which he is a member. This may be called the obvious and common-sense view in distinction from the mystical or the romantic.

III

Neither extreme view is altogether satisfactory. A nation, a Church, a college are indeed composed of individuals, but each of these is by most men felt to be something more than the aggregate of the units which compose it. Is it, then, an

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[9] *God, Man and the Church*, E.T., pp. 137, 145.
[10] *The Wisdom of God*, p. 203.

organism or like an organism? John Bull is, no doubt, a mythological figure, but does he not symbolize some supersensible reality?

The metaphor of the body lies to hand, but it is dangerous if taken for more than metaphor. The human body is the aggregate of the cells of which it is composed. When it is a dead body, it is nothing but the aggregate of cells. But, when it is a living body, it has a unity, a life, in which all the cells participate, which is not of them but is imparted to them by the whole. The nation or Church is, indeed, composed of individuals, but it is felt to be something more than the sum of the units that compose it. There is a life of the whole body politic or ecclesiastic in which all the members share and which is apprehended as the life of a spiritual reality greater than the sum total of the membership. The metaphor or illustration of the body is valuable as indicating the insufficiency and poverty of sheer individualism, but in Church and State it leads to confusion and unimaginable mythology if it be taken for more than metaphor. A cell in the human body cannot be a constituent element in two bodies at once. If Church and nation are super-persons, can the individual simultaneously be a constituent part of both? And how shall the number of super-persons be limited to two? If the Church universal is a super-personal substance, is not the Church of Scotland another? If England is a super-person represented by John Bull, is not the United Kingdom another super-person, and the British Commonwealth must be yet another! There seems no possible reason why we should ascribe super-personality to a nation or a Church and deny it to a school or college. *Unus homo plures personas sustinere potest* is a principle of Roman law, but can the obverse be true that several "persons" can incorporate a single individual? Is humanity a "person" made up of "persons" themselves incorporating individual "persons"? To what endless and meaningless mythology we seem invited!

We may be well advised to accept neither the mythology of the corporate person nor the individualistic notion of the solitary individual out of essential relation with his fellows. Familiar words of Burke about the nation might with little change be applied to a school, a college, a religious denomination.

" Society is indeed a contract ", he says; " subordinate contracts for objects of mere occasional interest may be dissolved at pleasure—but the State ought not to be considered nothing better than a partnership agreement in a trade of pepper or coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular State is but a clause in the great primeval contract of eternal society, linking the lower with the high natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place. . . . The municipal corporations of that universal kingdom are not morally at liberty at their pleasure, and on their speculations of a contingent improvement, wholly to separate and tear asunder the bands of their subordinate community, and to dissolve it into an unsocial, uncivil, unconnected chaos of elementary principles ". Such a passage may be thought an unanswerable reply to those who would regard man as an isolated individual logically prior to the society of which he is a member. But the word used by Burke is " partnership "; he does not point to some super-personal entity, an *ens subsistens*.

Once again we are turned back to anthropology or the doctrine of man. Each man is an individual eternally separate from his neighbour in that each of them is a particular idiosyncratic centre of consciousness. It is for ever impossible that one man should know what it feels like to be his neighbour. It is as separate beings that we exist, yet we do not exist in isolation from each other. A man's life is composed of many interests; there is the team for which he plays, the professional society to which he belongs, the friends with whom he delights to spend the evening, the

companionship, too, of his working hours; he may belong to a philosophical society or a musical society or a literary society, a political party or a church; he has his home. He is, indeed, an individual separate and distinct from everyone he meets, but he does not exist, and cannot exist, in separation from them. If a man could think his school, his college, his friends, his home, his church out of his life, what would be left? Certainly he would not be left, the he who thinks and feels and remembers. He might well continue to exist if any or all of these associations were now to be taken from him, but it is they that have made him what he is; his thoughts, his loves, his life are for ever qualified by these associations. He is not an unconscious constituent of a number of mysterious super-personalities; he is a man in mysterious partnership with many groups. "Each national society", writes Sir Ernest Barker,[11] "is a unity; and each expresses its unity in a common way of looking at life in the light of a common tradition, and in the development of a common culture, or way of life, in all its various forms. But each society is also a plurality. It is a rich web of contained groups—religious and educational; professional and occupational; some for pleasure and some for profit; some based on neighbourhood and some on some other affinity; all dyed by the national colour; and yet all (or most of them) with the capacity, and the instinct, for associating themselves with similar groups in other national societies, and thus entering into some form of international connection. . . . The State, we may say, is a national society which has turned itself into a legal association, or a juridical organization, by virtue of a legal act and deed called a constitution, which is henceforth the norm and standard (and therefore the 'Sovereign') of such association or organization."

Setting forth from the *persona ficta* of medieval jurisprudence we seem to have left the lawyers far behind, but Gierke's *Zentralgedanke der realen Gesammtpersönlichkeit*, his central thought of the reality of corporate personality, is both a political and a juristic notion, which has its exact parallel in the theological conception that the Church is not an organization but an organism. On the political side this notion is patient of a totalitarian interpretation; indeed, we are bound either to say that the State is

[11] *Natural Law and the Theory of Society*, I, p. xxiii.

the only corporate organism or to admit a delirious hierarchy of super-personalities beyond the dreams of traditional mythologies. The assertion, made in supposed agreement with the Apostle Paul, that the Church is not an organization but an organism, has enabled the enthusiastic to make claims on behalf of their denominations which the facts would seem to contradict, and, most perilous of all, has led to the virtual identification of the cause of the Church with the cause of Christ. If for a generation we could drop the metaphor of the Church as the Body of Christ and could replace it with the metaphor of the Bride of Christ, our theology might assume a soberer colour. There has grown up a mythology of the Church to counter-balance the mythologies of the totalitarian States. We go astray alike in politics and in theology, when we forget that all human associations, such as a nation, a church, a university, a golf-club, a musical society or an international fellowship, are relations between men, not substantial essences.

CHAPTER XII

The Concept of Positive Divine Law and the Common Good

I

Such associations as colleges, churches, guilds or football clubs would seem as natural (or as artificial) as the State itself. The State is *communitas communitatum*; where it attempts to control music, art, science, religion, sport and all subsidiary *communitates*, there is tyranny, the negation of the reign of law. Therefore in appropriate ways it must be the function of law to protect and foster such associations as express a desirable corporate will, though particular methods are, no doubt, a matter of politics, not of jurisprudence. We ask now only whether the Church is to be regarded in the eyes of the law as one amongst many charitable institutions, whether religion is a human interest parallel to music and to art, whether there is a law of God and, in particular, whether there is such a thing as positive divine law. This is not the old, much debated question of Church and State, but the much deeper question of religion and the State. That is, we are not concerned at the moment with the Established Church of England in its relations with the Crown, with Parliament, with the Privy Council, nor with the device whereby a body such as the Congregational Union of England and Wales, itself an association unrecognized by the law, creates a body called " the Congregational Union of England and Wales Incorporated " to hold its money and act as a person within the law; rather we are concerned with religion as declaring the transcendent law of God and with the relation of that law to the civil code and the national life. Is there really a law of God?

The answer of the modern secular world is No, and the lawyers themselves are disposed to answer that, if there be a law of God, it has nothing to do with their law. Hence the chaos of our times and the disrespect into which the law of the lawyers itself has fallen. In dissociating the law of the courts from a

divine law over the courts, we are in some danger of regarding religion as a social convenience with the same disastrous results as attended that experiment in the Roman Empire. Thus we think it very suitable that our King should be crowned in church; we have our well-attended religious services at the Cenotaph or round our village war memorials; we have national days of prayer. This cenotaph-religion, so to call it, is intimately associated with the coherence of the national life, with the maintenance of the national spirit and with the support of the secular civilization of the age. We are disposed to think that those concerned with religion for its own sake, the regular church-goers, who are interested in another world or in the states and conditions of their souls, should be free to follow their bent, so long as they comport themselves with due propriety, but theirs is to be regarded as one of the interests which private citizens may adopt within the wider circle of the nation. This is very like the situation in the Roman Empire where religion was regarded as an admirable, and indeed necessary, cement for society, and those whom we should call the more religious people could cultivate their religious states and prepare themselves for immortality in the Mystery Religions. This was therefore fundamentally a secular order of society. Eliminating the thought of the transcendent law of God it developed into a kind of Fascism or totalitarianism, although nominally of a Christian complexion. Moreover, Christianity is not a private cult like a Mystery Religion; it is concerned with the law of God and a universal sway over every part of life.

On the other side, it was the view of medieval theologians, and is still the view of some, that there is a positive law of God parallel, but superior, to the law of man. It might not unfairly be said that the Roman Church is governed by Canon Law rather than by the Bible. It is not usually maintained, however, that Canon Law is positive Divine Law, for Divine Law, it is said, must be immutable, and Canon Law can be varied by the authority that uttered it. The argument is curious, for it is claimed that the authority uttering Canon Law is the plenipotentiary of the Most High, and the Levitical law of the Old Testament is received as positive Divine Law, though it is said to have been abrogated in its ritual aspects in the new dispensation that came

with Christ. But modern historical inquiry has made it impossible to regard the Levitical code as positive Divine Law, for on its ritual side it is the least distinctive element in the religion of Israel, having innumerable parallels in what we call "primitive" religion in all parts of the world. It would indeed be proper to call the Natural Law, the *lex naturæ*, positive Divine Law, if only it could be reduced to a code, but that it cannot be. It is traditional for Christians to speak of "the new law", "the law of Christ", "the law of the Kingdom" as laid down in the Sermon on the Mount; and the Christian ethical code might be deemed positive Divine Law, but there is no such code. The ethical teaching of Jesus Christ comes to us in occasional or episodic form; from concrete instances principles may be inferred; we infer principles but are not given rules. In the New Testament there is no ethical system, and "the law of love" is not concrete positive law, as the lawyers use the term.

Bishop Butler [1] distinguished between the moral and the positive in religion. "Moral *precepts*", he said, "are precepts the reasons of which we see: positive *precepts* are precepts, the reasons of which we do not see." We may consider, for instance, the Dominical commands, "Go ye, therefore, and teach all nations, baptizing them into the Name of the Father and of the Son and of the Holy Ghost" and "This do in memory of Me". If Christ is the heavenly King, as Christians allege, these commands would appear to be laws duly promulgated by the proper authority for a community subject to that authority. It is true that secular lawyers would not be concerned with such law, but positive Divine Law it might seem to be, and therefore it would be proper that there be an ecclesiastical bar and judiciary to act in the King's name. But the fact that we feel instinctively that there would be something anomalous about this may be an indication that these precepts are not laws, though in form they seem to be. For the kingship of Christ is not exercised as are human kingships. "Behold, thy King cometh unto thee meek and riding upon an ass." "Ye call me Master and Lord, and ye say well, for so I am. If I, then, your Lord and Master wash your feet, ye ought also to wash one another's feet." "Behold, I am among you as he that serveth." It is the kings of the Gentiles that lord it over

[1] *Analogy*, II, 1, 26 f.

them, and they that exercise power among them are called benefactors, but " the Son of Man came not to be ministered unto but to minister and to give His life a ransom for many ". The commands of Christ are not law in the ordinary sense. " I have not called you servants " (or subjects) " but friends." " Positive Divine Law " would seem, then, a misleading term.

Yet the word " law " is not wholly misleading. Jesus Christ may be said to have accepted the civilization of his time as expressed in the law of the Jewish community and of the Roman Empire. At least he directly denounced neither; he assumed the role neither of social reformer nor of political revolutionary. He laid down the principles of conduct in the Kingdom of God. Some of his words, such as " give to every one who asks of you " or " resist not evil ", if taken literally and accepted as law, are incompatible with the continued existence of civilization and of the law itself. The command, " be ye perfect as your heavenly Father is perfect ", cannot be good law, for law does not require that which is impossible. Therefore some, not unnaturally, have concluded that in the teaching of Jesus Christ we have not a law but an ideal to which we must approximate as closely as circumstances permit. But such an interpretation involves a misuse of the texts. The Sermon on the Mount is categorical in its demands; there is no suggestion that its requirements are to be obeyed so far as circumstances permit. Jesus Christ demanded an unqualified obedience, not such as might be convenient or compatible with the outlook of the age. " The law of Christ ", then, might seem a proper term, but it is not a code of positive Divine Law. It is not like juristic law which is binding immediately and as it stands upon all men subject to its jurisdiction, for all men whatsoever must be subject to the law of God. Nor is it like the laws of chemistry which operate automatically. It is more like that *vis sanatrix naturæ* whereby a body that is injured seeks to adapt itself to the unforeseen circumstances and to regain health, or like that law or instinct whereby if an ants' nest is disturbed its denizens set about its restoration. It is a binding obligation to loyalty under all circumstances. But, since circumstances are infinitely variable, it is neither positive Divine Law nor a code. But it is in some sense law and obligatory in principle upon all men;

it belongs therefore to the nature of man; therefore it must fall under the cognizance of jurisprudence.

For the law is concerned with the good life of man upon this earth. It does not deal directly with men's souls, but men have souls; that is, they have a spiritual nature with spiritual needs as real as, though sometimes less aggressive than, their merely physical needs. Therefore the law, concerned for the good life of man on earth, is interested in man as a spiritual being. But the connection between law and religion is more intimate than that between the law and literature or music, which also are spiritual interests; for where the religious conception of man is overthrown, the law itself is overthrown; when man is regarded as a cog in a machine or an instrument of the State or in any other way as having no intrinsic value in himself, the result is the police-State and the end of law. Again, political action can foster, protect and encourage the ethical life, but cannot create it; that is the task of religion. Yet without ethical concern and insight law, as we understand it, cannot be. Therefore the vaunted total separation of Church and State, the secular and the sacred, the legal and the religious, is disastrous alike for the religion and for the State which accepts it as a principle. The State and the law must have some positive relation to religion.

For man by his very nature belongs obscurely to two worlds. He is, as Sir Thomas Browne put it, " that amphibious piece between a corporal and a spiritual Essence ". He belongs to the physical world of nature, transient, relative, imperfect and contingent; but through his reason he has, and knows himself to have, affinity with the transcendent, the unconditional and absolute. He is aware of two worlds impinging upon him, the world of the natural, the relative, the conditioned, and the world of the super-natural, the absolute, the unconditioned. He is conscious of the obligation of absolute justice, but it is only a relative justice than he can attain. But even that relative justice he can only achieve as he seeks to obey the absolute demands of justice. The Nazi perversion of justice, which was also the perversion of law, lay precisely in the repudiation of the absolute, the universal, the unconditional. The very existence of the reign of law, as we understand it, depends upon the interpenetration of the secular and relative by the eternal and

unconditioned. The flowering of the spiritual and cultural life of man depends upon civilization and the reign of law, and conversely civilization and the reign of law depend upon the recognition of the unchanging, the eternal, the super-natural, the sacred. Law, as we understand it in the West, rests upon the eternal law of God.

II

Again, it is the function of law to serve the good of society, the *commune bonum*. The English conception of the good of society as expressed in English law is ethical through and through. The theologian may define the common good in terms of the nature of man and of society; English law defines the common good, partially and empirically, in terms of public policy, for the rules of public policy are rules of law. Thus it is contrary to public policy to uphold contracts whose aim is to influence government policy for private ends; other contracts that are void are those to stifle prosecutions for felony, contracts of indemnity against forfeiture of bail, contracts of maintenance and champerty and many contracts in restraint of trade. There are many legal rules in the interest of general morals, as, for instance, that which holds void any contract for future illicit intercourse or contracts forbidding an unmarried person to marry and the like. The contracts which the courts will not enforce on the ground that they are contrary to public policy are set out by Anson under these heads,[2] agreements which injure the State in its relations with other States, such as tend to injure the public service, those which tend to pervert the course of justice or to the abuse of legal process, those which are contrary to good morals, those which affect the freedom or security of marriage or the due discharge of parental duty, and finally those in restraint of trade. If proof be sought that England still remains to a large extent a Christian country, positive evidence could be afforded by the rules of public policy as recognized and enforced by law.

The law should serve the common good. But what is the relation between the common good and the good of the individual? The two are neither to be identified nor set in opposition to each other. The State exists because man needs

[2] *Principles of the English Law of Contract*, ed. Brierly, pp. 217 ff.

such a society for the full realization of his manhood. Therefore in pursuing the public good he is also pursuing his private good. But his private good in this case is not to be identified with his material good. For his private good is not enhanced in any material sense when he is called to pay income tax, to serve on a jury or to join His Majesty's forces. The requirements and the service of the common good must place many limitations on the freedom of the citizen. Even if it could be shewn that there is no ultimate clash between private and public good, there is yet often a clash between a man's immediate and private felicity on the one side and on the other the public good.

Solovyov defined legal justice [3] as " the historically changeable determination of the necessary equilibrium, maintained by compulsion, between two moral interests—that of personal freedom and of the common good ". The State exists for the good of its members, but the welfare of the State is necessary to its members' good. There is therefore an inevitable tension between personal freedom and the common good. Both must be considered. Therefore Solovyov argues that the infliction of life-long sentence or of the death penalty is incompatible with legal justice as he has defined it, for in these cases, he says, one element in the relation, that of individual liberty, is wholly sacrificed to the other, the common good. Moreover these sentences involve a contradiction, for nominally they are imposed in the interests of the common good, but the common good includes the criminal's good, which in these cases is totally neglected.

For man as a rational being virtue is necessary for the good life no less than are material goods. The law cannot impose virtue, but it can discourage vice and give that setting of public life in which virtue may the more easily flourish. Freedom, again, is a spiritual demand of man, and freedom is always in jeopardy where loss of faith in God occurs—and that for two reasons, first because if there be no recognized *jus divinum*, there is no limit to the authority of the State; hence comes totalitarianism; second, because where man loses his sense of dependence on God, he loses his freedom over against the world, for there is for him no triumphing over the world by faith. It is therefore

[3] *The Justification of the Good*, E.T., p. 374.

part of the Western tradition which needs no alteration to meet the requirements of the present day that, as Dr. Rommen puts it,[4] " the common good can be realized only by enabling the citizens to fulfil their ultimate and transcendent end, the salvation of their souls, in pursuing their secular task in peace and security and in mutual help ".

[4] *The State in Catholic Thought*, p. 308, and in general, cc. XIII, XIV.

CHAPTER XIII

Conclusion

" What doth the Lord require of thee ", asked the prophet Micah (vi, 8), " but to do justly and to love mercy and to walk humbly with thy God? " What doth the law require of thee, say the lawyers of the great tradition, but to live honourably, and to take thought for your neighbour's good and to render every man his due? *Juris præcepta hæc sunt : honeste vivere, alterum non lædere, suum cuique tribuere.* The requirements of the law are akin to the requirements of religion. It has been the theme of the foregoing pages that if the requirements of religion be overlooked and men cease to walk humbly with their God, the requirements of the law will soon cease to be met, and, further, the law itself will insensibly change its requirements and soon turn into its own negation. It might be suggested that for every thirty boys convicted of " juvenile crime " in the courts today, we should impose a three months' sentence upon one philosopher who has failed to teach the ultimate distinction between right and wrong, and upon one lawyer whose conception of law has been so " pure " as to be uncontaminated with any principle of justice or of obligation. That would be unfair, of course, but perhaps not less unfair than to punish the boys for offences which ultimately and in large measure are due to *la trahison des clercs.*

I

" By me kings reign, and princes decree justice. By me princes rule, and nobles, even all the judges of the earth " (Prov. viii, 15–16). The ultimate source of positive law, said the Schoolmen, is God himself; the prince is God's vice-gerent; obedience to the law therefore is a matter of conscience, part of the duty that man owes to God. In the last resort only God is sovereign; this, as the men of the Middle Ages might have put it, is a theological principle given by theology to jurisprudence as a directive. We might prefer to say that the ultimate sovereignty of God is a religious principle which is also a dictate of reason and which therefore must be a presupposition

of rational theology as of rational jurisprudence. The first principles of reason are not patient of demonstration; we cannot prove them *a priori*, but some ' probable ' argument *a posteriori* is afforded by the consideration that if this principle be neglected or denied, law, as we understand it, is in jeopardy and the reign of law is quickly overset.

It is a matter of faith. But jurisprudence inevitably rests on faith. That it is the end of law to do justice and to render every man his due is a matter of faith, not proof; it may not claim to be self-evident, for it has escaped the notice of the Nazis and the Communists and even, it would seem, eluded the eagle eye of Aristotle, who recognized no rights of slaves. It is self-evident to those brought up under the influence of the Christian Bible. We cannot reject the religion of the Bible and permanently retain our law and justice. International Law and all hopes for the future of humanity rest upon faith in that ultimate " moral and political unity of mankind " of which Suarez testified or prophesied, for certainly it is not available to sight. " The moral and political unity of mankind " is, to use a theological term, an " eschatological " notion; that is to say, it both is and it is not; it is essentially of the future, yet in some degree it is realizable in the present. For instance, entering a nursery we may find that all its denizens are in extreme stages of mutual exacerbation; there is *stasis*, as the Greeks would call it, in the family; there is no mutual pleasure in one another's company; there is no agreement about what should be done; there is no possibility of harmonious co-operation, while present tempers prevail. But with this situation clearly in view we may still assert by faith and reason the moral and social unity of the family, meaning that a family is meant to be a moral and social unity, that mutual endurance in brotherly love is, as we may say, the immanent law of the family, the realization of which is the fulfilment of family life. Such an assertion is an utterance of faith in the sense that it is not susceptible of logical demonstration, but it is equally an utterance of reason, for we can make no sense of life nor of our own experience except on this hypothesis. So International Law and the hopes of humanity rest upon an assumed and ultimate " moral and political unity of mankind ", which is not realized but realizable, is not contrary to nature but the fulfilment of

nature, a dictate of faith and reason, of faith because it is not demonstrable by any unanswerable argument, of reason because ultimately human life makes no sense on any other hypothesis, and because impressive proof, that yet falls short of demonstration, is afforded by the work of Christian foreign missions. Some sociologists of eminence such as the school of Lévy-Brühl may maintain that there are two humanities one of which is capable and the other functionally incapable of scientific thought,[1] but the basis of International Law is the presupposition of the ultimate moral and political unity of mankind, as the world-wide Church is, as it were, the first fruits of that presupposition. The lawyer like the saint must live by faith.

II

The late Oliver Quick had a diverting story of an Indian who, being deeply in debt and receiving a large inheritance, distributed his new wealth to the poor and left his creditors unsatisfied. Something is amiss with charity when it is at variance with justice, for charity does more, not less, than justice. But owing to the hardness of men's hearts and the limitations of their unselfishness and imagination the justice of law can only be an approximation to ideal justice and a still remoter approximation to the ideal demands of charity. An extreme example of this is offered by Solovyov [2]: in the year of our Lord 1739 there was a Prussian enactment of Friedrich Wilhelm to this effect: " if an advocate or a procurator or any similar person ventures to present any petition to His Royal Majesty, either personally or through somebody else, it is the pleasure of His Royal Majesty that the aforesaid person should be hanged without mercy, and a dog be hanged by the side of him ". Solovyov comments that " of the legality or conformity to law of the enactment in question there can be no doubt; and there can equally be no doubt of its being opposed to the most elementary demands of justice "; but, as he points out later,[3] Friedrich Wilhelm was not actuated by a cruel desire to put to death advocates, procurators and dogs; rather he had an eye to the lawless rule of the Prussian barons who murdered for the sake of private

[1] *v. La Vie et L'oeuvre de Raoul Allier*, p. 293.
[2] *The Justification of the Good*, E.T., p. 364.
[3] *Ib.*, p. 367.

jealousy, and he was determined to put down denunciation and slander. If his motive can hardly be styled love, it was at least a concern for the common good, a very distant approximation to ideal justice and an acknowledgment of the reign of law in the interests of justice and the common good. Law cannot be identified with ideal justice but it must be related to conscience and thus to the transcendent and the sacred.

If it is true that positive law must always fall short of ideal justice, it is well to remember that ideal justice has no positive and effective content till it has been defined by law. Thus in Switzerland article 41 of the " code fédéral des obligations " runs,[4] " celui qui cause, d'une manière illicite, un dommage a autrui, soit intentionellement, soit par négligence ou imprudence, est tenu de le réparer ".[5] This might be regarded as an expression of the natural law of justice that reparation is due for injury; but we may consider how many of the terms of this sentence require definition by positive law; we must define " illegally "; we must ask what precisely is meant by " causing " an injury, and what exactly is an " injury ", and how is " intentionally " to be defined, and what exactly is covered by " negligence " and " carelessness ", and how is " reparation " to be interpreted? When we contemplate the nice distinctions that may be involved in these definitions that seem but quillets of the law, when we reflect how uncertain is litigation, and how easily the law which must be general may involve hardship or injustice for the individual, it is difficult for the layman (and possibly for the lawyer also) to regard God as the ultimate Author of the law and obedience as a religious duty. But in so far as the law aims at justice, it must be accepted as a human attempt to express the divine justice, the divine Reason, the divine Will. Obedience to the law is part of the obedience we owe to God.

III

The modern period is marked by the repudiation of natural law, and this by recent theologians as by those learned in jurisprudence. Luther is said by some to have repudiated " natural

[4] *v.* F. H. Lawson, *Negligence in the Civil Law*, p. 210, and Darbellay, *La Règle Juridique*, p. 112.

[5] Whoever illegally causes an injury to another, whether intentionally or by negligence or carelessness, is bound to make it good.

law " with " natural theology ", and Protestants are summoned by powerful voices to follow him in this. Luther's position has been very insufficiently studied in Great Britain,[6] but certainly Calvin, who also judged human nature pessimistically, identified the moral law of the Old Dispensation with the law of nature. It corresponds to the character of universal grace, he said, and to the cosmic working of the Holy Spirit that in all men the seeds of right and equity, the sense for order and the tendency to fellowship, are innate by nature.[7] Melancthon, who represents constitutional rather than prophetic Lutheranism, is very explicit.[8] The practical dictates of the natural law are as certain, he says, as that twice four is eight, but sin darkens our minds. He writes: " the will was turned to God prior to the Fall; true knowledge of God glowed in the mind and love to God in the will, and hearts without hesitation gave assent to this true knowledge and declared that we are made for the knowledge and worship of God and for obedience to this Lord who made us, nourished us, impressed his image upon us, who demands and approves things just, and on the other hand condemns and punishes things unjust ". This knowledge is, indeed, dimmed in us through our corruption, but it remains though we doubt it just as we doubt concerning Providence, doubt whether we are heard in prayer, and doubt " that first law itself ", that God rewards and punishes. Thus, if the Reformers were more pessimistic than the medieval Church, they doubted neither that there is a law of nature nor that we may have cognizance of it, *nec tamen extincta est penitus notitia naturalis de Deo* (nor yet is the natural knowledge of God quenched within us). How the conception of the law of nature was taken over into Protestant theology appears clearly in Hooker's *Ecclesiastical Polity* [9]; " the general and perpetual voice of men ", he writes, " is as the sentence of God himself. For that which all men have at all times learned, Nature herself must needs have taught; and God, being the Author of Nature, her voice is but His instrument ".

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[6] But see *The Catholicity of Protestantism*, ed. by R. N. Flew and R. E Davies, pp. 51 ff.
[7] *v.* J. Bohatec, *Calvins Lehre von Staat und Kirche*, pp. 16, 19, 20, 26.
[8] *v. Loci Praecipui Theologici* under the heading *de lege naturae.*
[9] I, 8, 3.

IV

The repudiation of natural law by modern teachers of jurisprudence has been largely due to the presentation of natural law by theologians in a static, abstract, *a priori* and unhistorical form. The term therefore has been largely dropped even where the idea has not been explicitly denied. It is beyond question that every system of law must be studied as an historical growth related to the story of the people whose system it is, not as an attempt to deduce conclusions from abstract ethical first principles. Yet, as has been indicated, jurisconsults who will have none of the term " natural law " are often offering a doctrine of ultimate principles or of the structure of the universe which differs from " natural law " only in terminology.

There is no doubt that the concept of natural law, which relates law to the transcendent, and thus gives jurisprudence an ethical basis and makes obedience a matter of conscience, can be set forth in a form that is wholly consonant with the historical view of jurisprudence. Thus M. Ellul points out that when law becomes highly technical, its connection with justice and natural law tends to be denied; it becomes then a mere matter of logical deduction, not, indeed, from *a priori* moral principles, but from statutes and precedents; law *can* be severed from justice and become a mere technique, but then, though it remains *loi*, it ceases to be *droit*.[10] " From the moment that *droit* in the strict sense exists, that *droit* has a content *essentially* common to all peoples. That is not to be explained by imitation nor by interpenetration of civilizations. It is not to be explained by the arbitrary decision of a government nor by the mere play of economic conditions. The phenomenon of the essential unity of the content of *droit* among all peoples is *incontestably a natural product of evolution*. The further the evolution of a civilization proceeds, the more the unification becomes possible." [11] There is no doubt that the historical approach to jurisprudence is justified and necessary, but man's rights are in God; there is no profane *droit* in the last resort. But there is no incompatibility between these two ideas.

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[10] *Le Fondement Théologique du Droit*, p. 22.
[11] *Ib.*, p. 20, italics mine.

V

We come back in the end to the intimate connection, the ultimate identity of *ratio*, *lex*, *natura*, *jus* which was the philosophy of Cicero. It has been frequently urged in these pages that law is not safe unless it be related to the transcendent will or law of God. It is the more important therefore to insist that, if justice be the will of God, it is also the demand of reason and of nature. Man may have kinship with the eternal, but he is also a part of nature. Both theologians and lawyers are prone (though in different ways) to be abstract and fail to relate their disciplines to the natural order. The view here commended is no fanciful or esoteric theological speculation but a reminder of the *philosophia perennis* significant alike for jurisprudence and theology. Justice and Reason, Nature and Law are terms that must be held together, for they rest upon an intuition or intimation of the Transcendent God, who is not only the Lord of Nature, but who also, as the divine Reason and Source of Justice, presides invisibly but inexorably over the Thing, the Parliament, the law courts, the international assemblies. To hold in true relation Reason and Law and Nature and Justice is to have a comprehensive philosophy which brings together the various faculties in the University, and may be the basis of a stable civilization once again in Europe. *Natura norma legis est; ex natura vivere summum bonum est*; but nature is here understood by the religious man. Said Bishop Berkeley, as slightly amended by Samuel Taylor Coleridge: " Whatever the world may opine, he who hath not much meditated upon God, the human mind, and the *summum bonum*, may possibly make a thriving earth-worm, but will most indubitably make a blundering patriot and a sorry statesman ". He may be learned in the law, yet he will as a lawyer serve his generation but indifferently well.

INDEX